IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBYN KRAVITZ, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF COMMERCE, *et al.*, Defendants.	No. 8:18-cv-1041-GJH

LA UNIÓN DEL PUEBLO ENTERO, *et al.*, Plaintiffs, v. WILBUR L. ROSS, in his official capacity as Secretary of Commerce, *et al.*, Defendants.	No. 8:18-cv-1570-GJH

DEFENDANTS' OPPOSITION TO PLAINTIFFS' RULE 60(b)(2) MOTION FOR RELIEF FROM FINAL JUDGMENT & REQUEST FOR INDICATIVE RULING UNDER RULE 62.1(a)

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INTRODUCTION

After 10 months of litigation, nearly two weeks of trial, and an order granting their requested relief in full—removal of a citizenship question from the 2020 Census—Plaintiffs have returned to Court seeking to reopen the record on their equal protection and § 1985 claims. They justify this extraordinary request with two documents purportedly found on hard drives belonging to a now-deceased redistricting specialist named Dr. Thomas Hofeller. One of these documents is an inscrutable paragraph allegedly from 2017 and seemingly related to the Voting Rights Act (VRA); the other is alleged to be a 2015 study by Hofeller observing that "[a] switch to the use of citizen voting age population [(CVAP)] as the [ ] population base for redistricting would be advantageous to Republicans and Non-Hispanic Whites," and "a disadvantage for the Democrats." Pls.' Rule 60(b)(2) Mot., Ex. 1 at Ex. D p. 7, 9, ECF No. 162 ("Pls.' Mot."). There is no evidence that the 2015 Hofeller study made its way to Secretary Ross (or anyone else in the government) and nothing in either document even arguably suggests that Secretary Ross harbored a discriminatory motive for including a citizenship question on the 2020 Census. So there is no basis to revisit this Court's prior determination that it could not "connect the dots" between the Secretary's decision and evidence of third parties' animus. *Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp. 3d 681, 712, 754 (D. Md. 2019).

Rule 60(b) imposes a high bar to reopening a closed case, and Plaintiffs' last-ditch effort fails each of its requirements. Their "new evidence" is not material and it would not produce a new outcome; their "new evidence" is neither "new" nor "evidence"; and their "new evidence" could have been revealed, and probed, during discovery if Plaintiffs had exercised due diligence. Granting their motion would also cause unfair prejudice to Defendants by providing last-second relief on an entirely new theory of liability that has never before been, and can no longer be, litigated before the deadline for finalizing census questionnaires. Each of these reasons provides a sufficient basis to deny Plaintiffs' motion.

Most fundamentally, Plaintiffs cannot show that the two "new" documents would have produced a different outcome. This is true on two levels. *First*, the 2015 Hofeller study simply analyzes the use of CVAP in redistricting. Whatever the merits of that redistricting issue, it has literally nothing to do with census response rates at all, let alone Plaintiffs' theory that "the Secretary's decision was made for the purpose of depressing immigrant response and motivated by discriminatory animus." *Kravitz* 366 F. Supp. 3d at 754. This "new evidence" would therefore not change the outcome of Plaintiffs' equal protection claim. That is alone sufficient to resolve this motion because, as this Court recognized, Plaintiffs' § 1985 claim rises and falls with their equal protection claim. *Id.* at 753.

Second, even if Hofeller's 2015 study demonstrated any relevant animus, Plaintiffs' effort to "connect the dots" between Secretary Ross's decision and a secret study recovered from a private citizen's personal hard drive, fails at every attempted connection. Specifically, Plaintiffs seek to impute a "discriminatory" motive to Secretary Ross through the following chain: (1) one of Hofeller's hard drives contained the unpublished 2015 study (discussing the use of CVAP rather than total population for redistricting) that evinces discriminatory animus against Hispanics; (2) those hard drives contained a separate, unrelated document (purportedly created in 2017, two years after the study) that contains a paragraph about the VRA and evinces no discriminatory animus; (3) that 2017 paragraph also appears in a draft letter (Neuman Letter) that A. Mark Neuman, an outside advisor to the Commerce Department, provided to then-Acting Assistant Attorney General John Gore in the Department of Justice; (5) Gore drafted a different letter (Gary Letter) to the Census Bureau, which (i) bore no resemblance to the Neuman Letter, (ii) did not contain any language from the 2017 document, and (iii) explained that data from the American Community Survey (ACS) is not "ideal" for VRA purposes; and (6) the Secretary decided to include a citizenship question on the 2020 Census to aid VRA enforcement. As this multi-link chain makes clear, Plaintiffs' latest effort to show animus is purely

imaginary. Among other deficiencies, Plaintiffs have not established (1) any connection between the 2015 Hofeller study and the 2017 Neuman Letter, which are separate documents concerning disparate subjects that were written years apart; (2) any connection between the Neuman Letter and the entirely different Gary Letter; or (3) any evidence that any official at the Commerce Department or the Department of Justice had ever read, reviewed, or even heard about the unpublished 2015 Hofeller study before its recent appearance in this litigation.

The Court has already considered and rejected a much more direct effort by Plaintiffs to impute animus to Secretary Ross. Specifically, the Court declined to impute animus to Secretary Ross despite Plaintiffs adducing "some evidence" that then-Kansas Secretary of State Kris Kobach—who *did* communicate directly with Secretary Ross—"harbor[ed] discriminatory animus towards noncitizens" and that his "desire for a citizenship question may have been motivated by that animus." *Kravitz*, 366 F. Supp. 3d, at 754. That rationale applies tenfold to Plaintiffs' latest theory that the Court should impute animus to Secretary Ross based on an unpublished 2015 study by a private citizen, despite there being literally no evidence that Secretary Ross (or anyone else in the government) was aware of that study, its findings, or its theories.

Meritless theories and attenuated events aside, Plaintiffs also cannot overcome the other requirements of Rule 60(b)(2). Most clearly, Plaintiffs argue that the Hofeller documents are "newly discovered evidence," but these documents are neither "new" nor "evidence." This information is not "new" because it could have been discovered with due diligence. Plaintiffs had more than adequate notice of Hofeller's (peripheral) role in this case and had adequate opportunity to probe it further. Plaintiffs' failure to do so is entirely their fault and cannot supply a basis for a do-over at the eleventh hour. Nor are the Hofeller documents "evidence" given that they are unauthenticated, hearsay, and ultimately inadmissible.

Finally, Plaintiffs' requested relief would cause unfair prejudice to Defendants in several ways and should be denied on that basis, too. Because the "newly discovered evidence" is relevant only to the use of CVAP in redistricting—not the undercount theory that has been the heart of Plaintiffs' case from day one—the Court would be granting last-second relief premised on a dramatic shift in the entire theory of this year-long case. That prejudice is unfair both on its own terms and because it would effectively foreclose Defendants from appealing this Court's ruling before the June 30, 2019 deadline for finalizing census questionnaires.

Given that Plaintiffs' application fails at every turn, the Court should not issue an indicative ruling that it would enter judgment for Plaintiffs. *See* Fed. R. Civ. P. 62.1(a)(3). For the same reasons, there is no "substantial issue" here; only a substantial amount of ink. *See id.* Plaintiffs' motion should be denied under Rule 62.1(a)(2).

STANDARD OF REVIEW

The relief provided by Rule 60(b) is an "extraordinary" remedy, "only to be invoked upon a showing of exceptional circumstance." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 102 (4th Cir. 1979). "Rule 60(b) of the Federal Rules of Civil Procedure has invested federal courts with the power in certain restricted circumstances to vacate judgments whenever such action is appropriate to accomplish justice." *Id.* at 101–02 (quotations omitted). But "[w]here the motion is nothing more than a request that the district court change its mind . . . it is not authorized by Rule 60(b)." *United States v. Williams*, 674 F.2d 310, 313 (4th Cir. 1982). Moreover, "such motions 'may not be used . . . to raise arguments which could have been raised prior to the issuance of the judgment.'" *Gordon v. Richmond Pub. Sch.*, 2013 WL 4829296, at *2 (E.D. Va. Sept. 10, 2013) (quoting *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998)). The Fourth Circuit has further cautioned that "[t]he remedy provided by the Rule . . . is extraordinary and is only to be invoked upon a showing of exceptional circumstances." *Compton*, 608 F.2d at 102.

"The consideration of Rule 60(b) motions proceeds in two stages." *Nat'l Credit Union Admin. Bd. v. Gray*, 1 F.3d 262, 264 (4th Cir. 1993); *Horowitz v. Fed. Ins. Co.*, 2017 WL 5624789, at *1 (D. Md. Nov. 22, 2017), *aff'd,* 733 F. App'x 105 (4th Cir. 2018). The movant must first establish "timeliness, a meritorious [claim], a lack of unfair prejudice to the opposing party, and exceptional circumstances." *Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993) (quoting *Werner v. Carbo*, 731 F.2d 204, 207 (4th Cir. 1984)). "Once the movant has met the threshold showings, he must satisfy one of the six enumerated grounds for relief under Rule 60(b)." *Nat'l Credit Union Admin. Bd.*, 1 F.3d at 266.

Plaintiffs invoke only Rule 60(b)(2), which governs the standards for relief from the judgment on the basis of newly discovered evidence. Fed. R. Civ. P. 60(b)(2). To be granted relief under Rule 60(b)(2), the movant must demonstrate:

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.

Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989); *Jordan v. United States*, 2019 WL 2297453, at *1 (D.S.C. May 30, 2019). These grounds "must be clearly substantiated by adequate proof." *In re Burnley*, 988 F.2d 1, 3 (4th Cir. 1992) (citations omitted); *Almy v. Sebelius*, 749 F. Supp. 2d 315, 338 (D. Md. 2010), *aff'd,* 679 F.3d 297 (4th Cir. 2012).

ARGUMENT

Plaintiffs fail at every step of the Rule 60(b)(2) analysis. Their unprecedented discriminatory-motive theory fails on its face, so they cannot establish a meritorious claim, they cannot show that the "new evidence" is material, and they cannot show that the "new evidence" would produce a different outcome. *See Dowell*, 993 F.2d at 48; *Boryan*, 884 F.2d at 771. On the merits, the "new evidence" does not evince discriminatory animus and, even if it did, it has literally nothing to do with Plaintiffs' actual

theory that "the Secretary's decision was made for the purpose of depressing immigrant response." *Kravitz*, 366 F. Supp. 3d at 754. Moreover, this Court already rejected a less-attenuated version of the same imputed-animus argument Plaintiffs advance now: it found no equal protection violation even when Plaintiffs adduced "some evidence" that Kobach, who communicated directly with Secretary Ross, "harbor[ed] discriminatory animus towards noncitizens" and that his "desire for a citizenship question may have been motivated by that animus." *Kravitz*, 366 F. Supp. 3d at 754 (deemphasized). If this direct Kobach-Secretary connection was not enough for liability, then the convoluted Hofeller-Secretary "connection"—traced through four people and four documents—cannot impose liability either.

Beyond the merits, Plaintiffs fail the rest of Rule 60(b)'s requirements and their motion should be denied on those bases, too. Foremost, their "new evidence" is inadmissible, cumulative of old evidence, and to the extent any information is "new," it could have been discovered with due diligence. *See Boryan*, 884 F.2d at 771; *In re Burnley*, 988 F.2d at 3. In addition, Rule 60(b) relief would cause unfair prejudice to Defendants by allowing Plaintiffs to completely reinvent their theory of liability mere days or weeks before 2020 Census questionnaires must be finalized, a timetable on which it would be impossible to litigate this entirely new theory of animus. *See Boryan*, 884 F.2d at 771. For all these reasons, Plaintiffs have come nowhere close to showing "exceptional circumstances" that justify the "extraordinary" relief authorized by Rule 60(b). *See Dowell*, 993 F.2d at 48.

I. Plaintiffs' "new evidence" does not meet the essential requirement for relief under Rule 60(b)(2) because it is neither material nor likely to change the outcome.

Plaintiffs' motion fails at the outset because their "new evidence" is unavailing on at least three levels. *First*, neither of the Hofeller documents evince discriminatory animus. Not even Plaintiffs argue that the VRA paragraph exhibits animus, and the 2015 Hofeller study of state-level redistricting has literally nothing to do with Plaintiffs' actual theory that "the Secretary's decision was made for the purpose of depressing immigrant response" *in the census*. *Kravitz*, 366 F. Supp. 3d at 754. *Second*, this

Court already considered and rejected a less convoluted version of the same argument—that a third party's animus can be imputed to Secretary Ross absent any evidence that the Secretary himself shared that animus. If Plaintiffs could not prevail on that evidence, their latest conjectural web surrounding Hofeller is also meritless. *Finally*, Plaintiffs' allegations debunk their own § 1985 conspiracy claim because they do not even allege, much less prove, that the supposed conspirators shared a common objective.

A. Plaintiffs' "newly discovered evidence" has nothing to do with the Secretary's allegedly discriminatory motive.

Plaintiffs' purported "new evidence" of discrimination—the unpublished 2015 Hofeller study—is completely irrelevant to their equal protection claims. As Plaintiffs admit, the 2015 Hofeller study simply recognized that "[a] switch to the use of citizen voting age population as the [] population base for redistricting would be advantageous to Republicans and Non-Hispanic Whites," Pls.' Mot. at 5 (quoting Pls.' Ex. 1 at Ex. D p. 9), and that "[u]se of CVAP would clearly be a disadvantage for the Democrats," Pls.' Ex. 1 at Ex. D p. 7. Those statements demonstrate no discriminatory animus against anyone; they are empirical observations—which Plaintiffs do not dispute—about the likely impact of States using CVAP for redistricting. Hofeller himself acknowledged that it is "important" to address "the political ramifications of using CVAP as the redistricting population standard," and he queried whether "the gain of GOP voting strength [would] be worth the alienation of Latino voters who will perceive a switch to CVAP as an attempt to diminish their voting strength." *Id.* at 4. But that question, he recognized, was "not the subject of [his] study." *Id.* Far from evincing discriminatory intent, Hofeller's work appears to have been a simple empirical research project.

And even if the 2015 Hofeller study had demonstrated a discriminatory rationale for using CVAP to conduct state-level redistricting, that is utterly irrelevant. Plaintiffs' theory is *not* that the citizenship question will harm them *because it will enable the use of CVAP* in redistricting; it is that the citizenship question harms them by causing a differential undercount in certain populations *regardless*

of how future redistricting is done. *See Kravitz*, 366 F. Supp. 3d at 754 (holding that Plaintiffs had not proved "by a preponderance of the evidence that the Secretary's decision was made for the purpose of *depressing immigrant response* and motivated by discriminatory animus" (emphasis added)); *see also* Pls.' Corrected Conclusions of Law, at ¶¶ 219–28, ECF No. 151-2 ("Pls.' Post-Trial Br.") (arguing that "[d]emonstration of the disproportionate impact of the addition of a citizenship question is sufficient to establish one of the circumstances supporting a finding of discriminatory intent"); *id.* ¶ 290 (arguing that various people conspired "to add a citizenship question to the 2020 Census to reduce response rates of people of color and immigrants"). Hofeller's study does not address that issue.

Indeed, had Plaintiffs challenged the citizenship question on the grounds that it would facilitate States' optional use of CVAP in redistricting—as opposed to causing an undercount in certain populations—their claims would have failed. Merely asking the citizenship question cannot have any discriminatory effect on redistricting unless *States* use the citizenship data in the discriminatory ways. And if the States do so, Plaintiffs could sue their respective States (or the relevant State officials). *See Wright v. North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015); *Terrebonne Par. NAACP v. Jindal*, 154 F. Supp. 3d 354, 363 (M.D. La. 2015); *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 267 (D.D.C. 2002); *Common Cause S. Christian Leadership Conference of Greater Los Angeles v. Jones*, 213 F. Supp. 2d 1106, 1108 (C.D. Cal. 2001). Equal-protection principles do not invalidate the Secretary's inclusion of a citizenship question on the census simply because States may or may not impermissibly utilize census data in redistricting years later. Had Plaintiffs pursued such a theory, they also would have likely lacked standing because their purported harm would be traceable to States' own independent redistricting decisions, not the Secretary's decision to reinstate a citizenship question. *See Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

That is presumably why Plaintiffs challenged the citizenship question on the ground that it would purportedly harm the accuracy of the census, rather than because it could enable States to use

CVAP in redistricting. And that is precisely why Plaintiffs' current motion is self-defeating: the record actually demonstrates the need for *accurate* census data in redistricting. Even Hofeller said so. When asked the "substance" of his conversations with Hofeller "about the citizenship question," Neuman testified:

> Well, [Hofeller] talked about how block level data was -- and, again, block level data is an obsession with him, because block level data means that you can draw the most accurate districts. And so, again, his focus was always on block level data, and always on, "Mark, you need to make sure that we take a good census, that the administration doesn't skimp on the budget," because a good census is good for what he does.

Defs.' Ex. D, Neuman Dep. 138:3–16. Given that Hofeller stressed the importance of an accurate census, transferring Hofeller's intent to the Secretary (laundered through Neuman and Gore) cannot support Plaintiffs' equal protection claim *as they pled and tried this case—i.e.*, based on "depressing immigrant response." *Kravitz*, 366 F. Supp. 3d at 754.

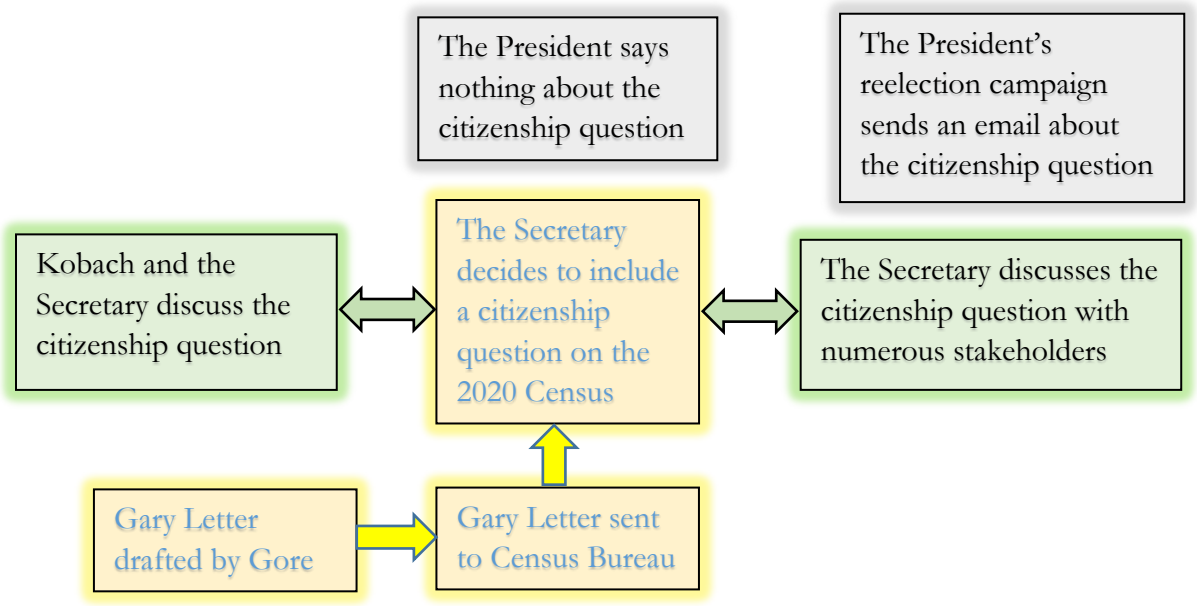
In short, the 2015 Hofeller study does not support Plaintiffs' theory of animus and thus could not change the outcome. The 2015 Hofeller study concerned only the use of CVAP in state-level redistricting; it says nothing about census accuracy. That alone resolves this motion because Plaintiffs' § 1985 claim "rises and falls with their Equal Protection claim." *Id.* at 753.

B. The Court rejected Plaintiffs' prior efforts to impute animus to Secretary Ross, foreclosing their latest theory.

Following lengthy proceedings, this Court rejected Plaintiffs' prior effort to impute animus to Secretary Ross. And Plaintiffs offer no reason to think their new, far-more-attenuated theory would change the outcome. As the Court explained after trial, Plaintiffs "offered little, if any evidence, showing Secretary Ross harbors animus towards Hispanics or that such animus impacted his decision." *Kravitz*, 366 F. Supp. 3d at 754.[1] Previously, Plaintiffs attempted to establish the Secretary's

[1] Defendants maintain their position that Plaintiffs' due process claim should be decided, if at all, on the basis of the administrative record before the Secretary and "not some new record made

discriminatory motive through the allegedly discriminatory views of "other individuals, including the President and Secretary Kobach." *Id.* Plaintiffs offered evidence that the Secretary had spoken directly with Kobach about the citizenship question, and that the President's reelection campaign had sent an email about the citizenship question:

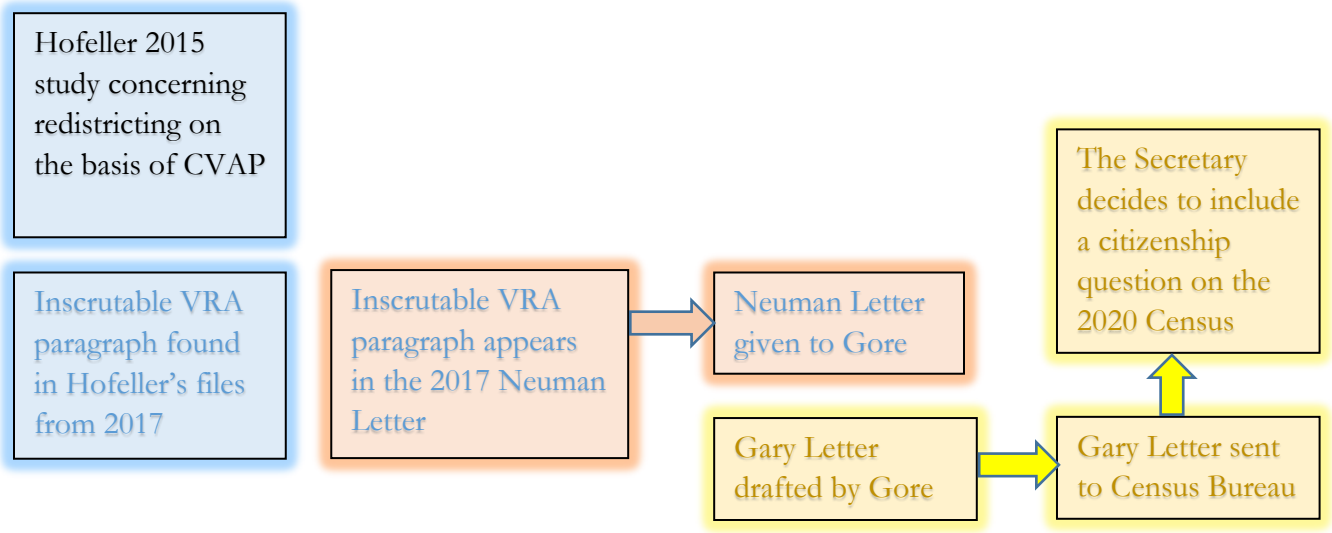


id. at 694, 712. Plaintiffs then argued that the views of these third parties—Kobach and the President—provided sufficient basis to impute animus to Secretary Ross. This theory only went so far: Plaintiffs had adduced "some evidence" that Kobach—who communicated directly with Secretary Ross—"harbor[ed] discriminatory animus towards noncitizens" and his "desire for a citizenship question may have been motivated by that animus." *Kravitz*, 366 F. Supp. 3d at 754 (deemphasized). But this Court nonetheless found that "Plaintiffs [did] not sufficiently tie[] those views to *Secretary Ross's* decision." *Id.* at 754 (emphasis added).

Plaintiffs are now seeking to reopen this case with a far-more-attenuated theory than the one this Court rejected. Specifically, Plaintiffs now contend that (1) the unpublished 2015 Hofeller study

initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (*per curiam*). Nonetheless, Plaintiffs' Rule 60(b) motion should be denied even if the Court considers this extra-record evidence.

(discussing the use of CVAP rather than total population for redistricting) evinces discriminatory animus against Hispanics; (2) there is an unrelated VRA paragraph in a completely different document from 2017 also purportedly found on one of Hofeller's hard drives (a document that Plaintiffs do not allege evidences discriminatory animus); (3) that paragraph also appears in the Neuman Letter given to Gore; (4) Gore drafted the Gary Letter—which bore no resemblance to the Neuman Letter, which did *not* contain any language from the 2017 document found on Hofeller's hard drive, and which explained that ACS citizenship data is not "ideal" for VRA purposes—that was sent to the Census Bureau; and (5) the Secretary decided to include a citizenship question on the 2020 Census to obtain better data for VRA enforcement. *See* Pls.' Mot. at 5–8.



It is on that absurd basis that Plaintiffs seek to impute animus to the Secretary. But far from establishing "a clear through-line" of discriminatory motive from the 2015 Hofeller study to the Secretary's 2018 decision, *id.* at 10, these facts reveal no connection whatsoever. It is impossible to see how Hofeller's "discriminatory motive" (gleaned from an unseen document concerning *redistricting*, not the accuracy of the census) could somehow be imputed to the Secretary through a cryptic paragraph in a separate document also appearing in the Neuman Letter, then through Gore's receipt

of the Neuman Letter, then through the Gary Letter sent to the Census Bureau (which did not include that inscrutable paragraph), and then through the Secretary's independent decision to reinstate a citizenship question. If the direct Kobach-Secretary connection was not enough for liability, then the circuitous Hofeller-Secretary "connection" cannot impose liability either.

A closer examination only further demonstrates that the purported chain fails at every link. The first disconnect is Plaintiffs' attempt to tie the 2015 Hofeller study to the 2017 Neuman Letter by way of a separate VRA paragraph allegedly found on Hofeller's hard drive. Other than their mutual presence on Hofeller's hard drives, there is no apparent connection between the 2015 study and the 2017 draft paragraph. Not only are those documents distinct in substance and form—one addresses redistricting; the other seemingly addresses the VRA—but they were penned two years apart. And although this paragraph appears verbatim in both Hofeller's standalone document and the Neuman Letter, Plaintiffs offer no competent evidence establishing the provenance of the Hofeller paragraph, let alone that Hofeller (a) wrote it or (b) transmitted it to Neuman. Neuman's own testimony underscores this uncertainty. In response to a question about who "provided" the letter to him, Neuman testified: "I'm not sure which version this is. Again, I'm familiar with the letter. I'm not sure who the original author is. I'm sure that I looked at it. I might have commented on it, but I'm not sure who wr[ote] a first—a first template, as it were." Defs.' Ex. D, Neuman Dep. 280:8–15.

Plaintiffs also fail to establish any transferred intent between Hofeller and Neuman. Views that Hofeller allegedly expressed in an unpublished 2015 study are not evidence of what he told Neuman years later. In fact, when asked the "substance" of his conversations with Hofeller "about the citizenship question," Neuman testified that Hofeller simply wanted to "take a good census" and confirm that "the administration doesn't skimp on the budget." Defs.' Ex. D, Neuman Dep. 138:3–16. Neuman went on to testify extensively about Hofeller but never mentioned any discussion of using block-level census data for CVAP redistricting (*i.e.*, the subject of the 2015 Hofeller study). *See*,

e.g., *id.* at 33:2–10, 36:19–45:14, 51:7–53:3, 55:9–59:6, 64:18–67:14, 89:11–90:13, 100:18–101:7, 136:17–139:3, 143:13–144:6. To the contrary, Neuman testified—under oath—that he wanted to "maximize[]" representation for the "Latino community," not dilute it. *Id.* at 142:3–23.

Plaintiffs also offer no evidence to connect the Neuman Letter provided to Gore with the separate Gary Letter that Gore drafted, which ultimately went to the Census Bureau. While it is true that Gore received the *Neuman Letter*, Plaintiffs provide no evidence that this document in any way influenced Gore's drafting of the entirely separate *Gary Letter*. Testimony in the record proves the opposite: Gore explained that he "wrote the first draft of the letter" from DOJ, Defs.' Ex. C, Gore Dep. 127:12–17, and Neuman said that he "wasn't a part of the drafting process." Defs.' Ex. D, Neuman Dep. 114:19–20. Everyone seems to agree on this point. *See* Pls.' Post-Trial Br. ¶ 291, ECF No. 151-1 ("Acting Assistant Attorney General Gore drafted the DOJ Letter"); *see New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 555 (S.D.N.Y. 2019) (describing Gore's drafting process with no mention of the Neuman Letter). That makes sense because even a cursory review of both documents reveals that they are completely different in substance, language, and form. *Compare* Defs.' Ex. B at 4–5, Neuman Letter *with* Defs.' Ex. A, Gary Letter. As Neuman testified, the Neuman Letter is "very different" from the Gary Letter. Defs.' Ex. D, Neuman Dep. 280:23-24. So any suggestion that the Neuman Letter constituted a "draft" of the Gary Letter is false. Indeed, Plaintiffs have had the Neuman Letter for *months*, yet never previously suggested that it bore any resemblance to the Gary Letter or served as its initial draft. *See infra* Section III.A.

Plaintiffs also offer absolutely nothing to connect the allegedly "discriminatory" ideas expressed in the 2015 Hofeller study with the Gary Letter drafted by Gore. Plaintiffs provide no evidence that Gore ever read, received, or was even aware of the existence of that unpublished study, much less that he had any such awareness when drafting the Gary Letter. Nor can they, because this evidence does not exist. To the extent the 2015 Hofeller study and the Gary Letter highlight similar

problems with ACS data,[2] that is entirely unsurprising: those issues are widely known, and have been discussed in case law and academic literature for years. *See, e.g.*, *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1030 (E.D. Mo. 2016), *aff'd*, 894 F.3d 924 (8th Cir. 2018); *Fabela v. City of Farmers Branch*, 2012 WL 3135545, at *7 (N.D. Tex. Aug. 2, 2012); *Benavidez* v. *Irving Indep. Sch. Dist.*., 690 F. Supp. 2d 451, 457-458 (N.D. Tex. 2010); Justin Levitt, *Democracy on the High Wire: Citizen Commission Implementation of the Voting Rights Act*, 46 U.C. Davis L. Rev. 1041, 1109 n.116 (2013); Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count*, 32 Cardozo L. Rev. 755, 776–77 (2011). Indeed, the Gary Letter's discussion of the downsides of ACS citizenship data bears just as much, if not more, resemblance to briefs filed in *Evenwel v. Abbott*—the Supreme Court's 2016 decision concerning CVAP in redistricting—than it does to the 2015 Hofeller study. *See* Defs.' Ex. E. Gore even testified that he reviewed briefs in that case. Defs.' Ex. C, Gore Dep. 339:13–340:4. Yet it would be absurd to impute the various intentions of the authors of those briefs to Gore based on any linguistic or structural similarities. And it is equally absurd to impute the malicious intent (if any) of Hofeller—expressed in a secret study stored on his personal hard drive—to Gore via the separate Neuman Letter.

Finally, even if the factual underpinnings of Plaintiffs' "causal" chain had not been thoroughly debunked, their transferred-intent theory of discriminatory motive would fail as a matter of law. It is beyond dispute that only the Secretary's intent is relevant to Plaintiffs' equal protection claims. *See Kravitz*, 366 F. Supp. 3d at 753 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)) ("Plaintiffs bear the burden of demonstrating that an 'invidious discriminatory purpose

[2] Plaintiffs claim that "the DOJ Letter contains many similarities to the Neuman-Hofeller letter." Pls.' Mot. at 6 n.2. Defendants assume this is a typographical error because the two documents could not be more different. *Compare* Defs.' Ex. B at 4–5, Neuman Letter *with* Defs.' Ex. A, Gary Letter. To the extent Plaintiffs meant that the Gary Letter "contains many similarities" to the 2015 Hofeller study, Defendants address that argument in the accompanying text.

was a motivating factor' behind the *Secretary's* decision." (emphasis added)); *id.* (recognizing that a "showing of disparate impact . . . is relevant to prove that the *decisionmaker* acted with a forbidden purpose" (emphasis added)). Yet not even Plaintiffs allege that Secretary Ross was aware of Hofeller's unpublished 2015 study or its ideas; their discriminatory-motive theory depends entirely on the subjective desires of others.

Plaintiffs' attempt to trace Hofeller's "discriminatory" intent through four people (Hofeller, Neuman, Gore, and the Secretary) and four documents (the 2015 Hofeller study, the Neuman Letter, the Gary Letter, and the Secretary's decisional memorandum) stretches the discriminatory-motive inquiry beyond its breaking point.[3] And while a "discriminatory purpose may often be inferred from the totality of the relevant facts," *id.* (citations omitted), the "relevant facts" cannot include the purported discriminatory animus of an individual (Hofeller) who talked to another individual (Neuman) who talked to another individual (Gore) who never talked to the decisionmaker (Secretary Ross).[4] That conception of equal protection liability is absurd and would invalidate every government

[3] Plaintiffs seemingly try a new strategy in this motion: attempting to impute Neuman's/Gore's allegedly discriminatory motivations to the Secretary given that "[t]he October 2017 Neuman-Gore meeting, at which Neuman gave Gore the draft letter, was arranged by the Commerce Department's in-house counsel." Pls.' Mot. at 7. This is not new information. Neuman testified at his deposition that his meeting with Gore was at the request of James Uthmeier, then an attorney in the General Counsel's office at the Commerce Department, and Neuman further testified that he did not know "who originally had the idea" but that he thought it was "someone at the Commerce Department." Defs.' Ex. D, Neuman Dep. 112:5–25, 113:1–22. In any event, Plaintiffs' newfound emphasis is a red herring. This Court previously precluded Plaintiffs' attempt to impute the President's motivations to Secretary Ross simply because White House Chief Strategist Steve Bannon asked the Secretary to speak with Kobach. *See Kravitz*, 366 F. Supp. 3d at at 754. This rationale similarly bars Plaintiffs' attempt to impute Neuman's/Gore's motivations to the Secretary simply because the Commerce Department's in-house counsel arranged the meeting.

[4] Gore's testimony concerning Secretary Ross's intent went no further than the Secretary's decisional memorandum. *See, e.g.*, Defs.' Ex. C, Gore Dep. 36:8–22, 37:1–22, 38:1–8, 41:8–16, 42:13–22, 43:1–3, 284:17–22, 285:1–15, 317:4–22, 318:1–8. When asked if he "ever discussed the issue of the citizenship question with Secretary Ross," Gore responded: "No." *Id.* at 89:22, 90:1–2. When asked if he was "consulted by Secretary Ross regarding whether the Department of Justice would

action as the result of innocuous contact with allegedly discriminatory individuals thrice removed. *Cf. Sierra Club v. Costle*, 657 F.2d 298, 402 (D.C. Cir. 1981).

C. Plaintiffs' § 1985 claim fails because their "newly discovered evidence" cannot show that alleged conspirators shared the same conspiratorial objective.

Plaintiffs § 1985 conspiracy claim fails[5] for this same basic reasons as their equal protection claim: Plaintiffs' new information comes nowhere close to showing the meeting of the minds required to establish a conspiracy. An actionable conspiracy under § 1985(3) requires "an agreement or a 'meeting of the minds' by defendants to violate the claimant's constitutional rights." *Simmons v. Poe*, 47 F.3d 1370, 1377 (4th Cir. 1995). Plaintiffs must therefore prove "that each member of the alleged conspiracy shared the same conspiratorial objective." *Penley v. McDowell Cty. Bd. of Educ.*, 876 F.3d 646, 658 (4th Cir. 2017). This "burden is weighty," *id.*, and the Fourth Circuit "has *rarely, if ever*, found sufficient facts to establish a section 1985 conspiracy," *Simmons*, 47 F.3d at 1377 (emphasis added). Plaintiffs have again failed to adduce such facts, instead relying on what is essentially a conspiracy theory with a rotating cast of characters.

This Court already rejected Plaintiffs' effort to show a conspiracy, *Kravitz*, 366 F. Supp. 3d at 754, and nothing in their "new evidence" would produce a different outcome now. At trial, Plaintiffs argued that "[m]embers of the Trump Administration, [then-Kansas Secretary of State Kris] Kobach, the Secretary, and members of the DOJ agreed to add a citizenship question." Pls.' Post-Trial Br. ¶ 290. Plaintiffs have now added Neuman and Hofeller to the mix based on the "newly discovered"

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support or request the inclusion of a citizenship question on the decennial census," Gore responded: "No." *Id.* at 90:10–15.

[5] As this Court has recognized, rejecting Plaintiffs' equal protection claim is sufficient to defeat their § 1985 claim. *Kravitz*, 366 F. Supp. 3d at 753. Defendants also maintain that § 1985 does not authorize courts to award injunctive relief, that this claim is barred by sovereign immunity, and, if not so barred, Plaintiffs cannot maintain their APA claims because they have an adequate alternative remedy. *See* Defs.' Post-Trial Br. ¶¶ 536–47, ECF 150.

2015 Hofeller study. Pls.' Mot. at 18. But these additions cannot salvage their meritless § 1985 claim because, even under Plaintiffs' own theory, none of the conspirators share the same objective. Kobach wanted to add a citizenship question to "to address the problem of counting immigrants for *Congressional apportionment* purposes." Pls.' Mot. at 15 (emphasis added). The Executive Branch officials[6] supposedly desired a citizenship question "to reduce response rates of people of color and immigrants." Pls.' Post-Trial Br. ¶ 290. And Hofeller/Neuman purportedly sought a citizenship question to enable States' "discriminatory" use of CVAP for redistricting after the census. Pls.' Mot. at 5–6. These assorted goals are far from the "same conspiratorial objective" and thus cannot support a § 1985 claim. *Penley*, 876 F.3d at 658; *see supra*, Section I.A. (explaining that the use of CVAP for "discriminatory" redistricting is incompatible with the goal of depressing census response rates). That ends the inquiry.

Courts in this circuit have routinely rejected § 1985 claims on similar grounds. *See, e.g.*, *Facey v. Dae Sung Corp.*, 992 F. Supp. 2d 536 (D. Md. 2014) (dismissing § 1985(3) claim where plaintiff alleged that two of the putative conspirators were motivated by a retaliatory interest rather than discriminatory animus, leaving only one conspirator with an allegedly illicit purpose); *Victors v. Kronmiller*, 2009 WL 971448, at *9 (D. Md. Apr. 8, 2009) (dismissing a § 1985 claim where there was no "direct or circumstantial evidence of an agreement to deprive plaintiffs of their constitutional rights"), *aff'd,* 397 F. App'x 893 (4th Cir. 2010); *Martin v. Boyce*, 2000 WL 1264148, at*7 (M.D.N.C. July 20, 2000) (dismissing claim where "no more than one member of the alleged conspiracy had a racist motive" because "when only one conspirator is motivated by a forbidden purposes, there can be no meeting

[6] The intra-corporate conspiracy doctrine applies to § 1985 claims. *Buschi v. Kirven*, 775 F.2d 1240, 1251-52 (4th Cir. 1985). So members of the Executive Branch—"the Secretary," "members of the Trump Administration," and "members of the DOJ," Pls.' Mot. at 18—cannot conspire with each other because "there is no unlawful conspiracy when officers within a single [ ] entity consult among themselves and then adopt a policy for the entity." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017).

of the minds, no agreement to deprive another of the equal protection of the laws because of his race"). This Court should thus reject Plaintiffs' § 1985 claim—again.

II. Plaintiffs' "newly discovered evidence" is neither "new" nor "evidence."

Aside from Plaintiffs' fatuous theory on the merits, their Rule 60(b)(2) motion also fails because their "new evidence" is inadmissible, cumulative of old evidence, and in any event could have been discovered with due diligence. *See Boryan*, 884 F.2d at 771; *In re Burnley*, 988 F.2d at 3. This provides an independent basis to deny their request for eleventh-hour relief.

A. Plaintiffs' "evidence" is not "new" because it was, or could have been, discovered with due diligence.

Plaintiffs' information is not "new" evidence because Plaintiffs could have discovered it with due diligence. They attempt to sidestep this failure by claiming that Neuman provided misleading deposition testimony, which hindered their ability to discover "Hofeller's significant role in promoting the addition of the citizenship question." Pls.' Mot. at 20. But Plaintiffs' that theory is viable only if the Court *already believes* Plaintiffs' unsupported assertions that Hofeller had a "significant role in promoting the addition of the citizenship question," and therefore *assumes* that Neuman provided untruthful testimony. That is pure tautology: Neuman misrepresented Hofeller's role because he was concealing Hofeller's role. Contrary to Plaintiffs' circular logic, the only competent evidence in the record—nearly 14 hours of sworn testimony from Neuman and Gore—is fully consistent and demonstrates the unexciting truth: Hofeller played little, if any, role in advocating for a citizenship question.[7] Plaintiffs fail to identify a single question that was misleadingly answered in light of the "new" documents themselves, as opposed to erroneous inferences from those documents.

[7] Although Defendants address Plaintiffs' groundless assertions about Neuman's testimony, Neuman was not a governmental employee and the government did not represent him in this litigation. Indeed, Neuman retained private counsel and routinely disregarded the government's

Much of Plaintiffs' unfounded conjecture about Hofeller's role hinges on the cryptic VRA paragraph (supposedly found among Hofeller's files) that also appears in the Neuman Letter. From this, they surmise that Neuman's deposition testimony "mischaracterized Dr. Hofeller's substantive involvement."[8] Pls.' Mot. at 20. But if Plaintiffs did not receive the information they now desire, that is the product of their own deposition decisions. In fact, Neuman was discussing the Neuman Letter's authorship when Plaintiffs' counsel cut him off: "I don't—I don't want—I don't—I'm not asking you to tell me about who the original author was or anything." Defs.' Ex. D, Neuman Dep. 281:23–25. It is quite extraordinary for Plaintiffs to now complain about Neuman's failure to tell them something they instructed him not to tell them. *See Martal Cosmetics, Ltd. v. Int'l Beauty Exch.*, 2007 WL 2126091, at *6–7 (E.D.N.Y. July 24, 2007) (finding that because a party failed to take depositions or ask certain questions, that party "cannot now be heard to complain about the consequences of their indolence"). And Plaintiffs did not lack for opportunity; Neuman testified at length about Hofeller and the discussions they had about redistricting and the census. *See*, *e.g.*, *id.* at 33:2–10, 36:19–45:14, 51:7–53:3, 55:9–59:6, 64:18–67:14, 89:11–90:13, 100:18–101:7, 136:17–139:3, 143:13–144:6. In short, Plaintiffs were well aware of Hofeller's connection to Neuman. If they had wanted to know more, they could have questioned Neuman further. They did not.

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instructions not to answer certain deposition questions on the basis of privilege. *See, e.g.*, Defs.' Ex. D, Neuman Dep. 124:15–126:23, 273:18–274:5.

[8] Plaintiffs similarly quibble with Neuman's testimony that he did not rely on Hofeller for "expertise on the Voting Rights Act." Pls. Mot. at 19. But even if the author of the Neuman Letter purportedly excerpted from Hofeller's (unauthenticated) document, one nonsensical paragraph does not mean that the author of the Neuman Letter—much less Neuman himself—relied on Hofeller as an "expert." And in any event, this conjecture is contradicted by the evidence. In response to a question about who "provided" the letter to him, Neuman testified: "I'm not sure which version this is. Again, I'm familiar with the letter. I'm not sure who the original author is. I'm sure that I looked at it. I might have commented on it, but I'm not sure who wr[ote] a first—a first template, as it were." Defs.' Ex. D, Neuman Dep. 280:11–15.

Plaintiffs' contention that they "did not learn about [Neuman providing Gore the Neuman Letter] until well after the conclusion of trial in this case," is equally unavailing. To begin, both the Department of Justice and Neuman produced the Neuman Letter in full during discovery. *See* Defs.' Ex. B at 4–5, Defs.' Email Attaching Neuman Letter. And in the cover email to Plaintiffs' counsel, Defendants expressly said: "These materials were collected from John Gore" "in hard copy." *Id.* at 3. So Plaintiffs have known since at least October 23, 2018 that Gore had the Neuman Letter, which belies their claim that they learned that fact only recently. *See id.*

Plaintiffs also deposed both Neuman and Gore *after* receiving the Neuman Letter in discovery and thus had every opportunity to ask questions about that document. For Gore's part, he did not testify that Neuman gave him a draft of the Neuman Letter. But again, that is because *Plaintiffs did not ask him about it*. Gore disclosed that he talked to Neuman while drafting the Gary Letter. *See* Defs.' Ex. C, Gore Dep. 437:20–438:13. When Plaintiffs asked for the substance of that conversation, the government appropriately asserted deliberative-process privilege—an assertion that Plaintiffs chose not to challenge. *Id.* at 437:14–20. And instead of following up to ask whether Neuman gave Gore any materials, Plaintiffs simply moved on to other topics. *Id.* at 437:22–438:13.

For Neuman's part, Plaintiffs asked him what he gave to Gore, and Neuman answered: "Mainly the—mainly a copy of the—of the letter from the Obama Administration, Justice Department, to the Census Bureau on the issue of adding a question on the ACS." Defs.' Ex. D, Neuman Dep. 123:25–124:3. After asking some follow-up questions about that document, *id.* at 124:4–126:16, counsel moved on to another topic, *see id.* at 126:19–20. Plaintiffs' counsel never asked *what else*, if anything, Neuman gave Gore beyond the Obama-era document. Neuman's failure to inform Plaintiffs that he also gave Gore a copy of the Neuman Letter is thus traceable to Plaintiffs' less-than-thorough deposition questioning, not Neuman. *See Waddell v. Hendry Cty. Sheriff's Office*, 329

F.3d 1300, 1310 (11th Cir. 2003) (denying Rule 60(b)(2) motion where "[i]t was Plaintiffs' tactical decisions, not fraud by Defendants, that prevented Plaintiffs from fully presenting their case").

Plaintiffs also take issue with Neuman's testimony that he "wasn't part of the drafting process of the [Gary] letter," and that he "denied that his October 2017 meeting with Gore was about a 'letter from DOJ regarding the citizenship question.'" Pls.' Mot. at 20. The first part of Plaintiffs' contention is unequivocally true: as explained above, everyone seems to agree that Gore drafted the Gary Letter, and Plaintiffs provide no evidence that the Neuman Letter had any impact on Gore's drafting process. *See supra* Section II. As for the second part, Plaintiffs selectively quote Neuman's response to one question asking what the Gore-Neuman meeting was "about." *See* Defs.' Ex. D, Neuman Dep. 273:10–21. In fact, Neuman testified at several points during his deposition that he discussed a citizenship question (and a DOJ letter to the Census Bureau) with Gore. *See, e.g.*, *id.* at 110:5–8, 114:15–23, 123:20–124:3.

Plaintiffs further protest Neuman's testimony that "Hofeller's interest in obtaining citizenship data from the decennial census was for the purposes of creating Latino-majority voting districts," and they argue that "Neuman failed to disclose that Hofeller's detailed [2015] study recommended the inclusion of a citizenship question to benefit 'Republicans and Non-Hispanic Whites.'" Pls.' Mot. at 19. But the views Hofeller expressed in a 2015 study have no bearing on what he told Neuman years later. And Neuman specifically testified that "maximizing" representation for the "Latino community" was his goal, not anything he gleaned from Hofeller. *See* Defs.' Ex. D, Neuman Dep. 142:3–23 ("My point about maximization is my word. I want Latino representation to be maximized."). Plaintiffs also present no evidence, or any reason to assume, that Hofeller provided his unpublished 2015 study to Neuman. To the contrary, Plaintiffs present evidence that the 2015 Hofeller study was intended solely for his then-client and "would not be attributed [to him] either directly or indirectly." Pls.' Ex. 1 at Ex. C p. 2.

As the evidence makes clear, there were no "evident misrepresentations and omissions" by Neuman (or Gore, for that matter), Pls.' Mot. at 20; only deposition questioning that elicited unremarkable testimony. Plaintiffs' claim that they were "hardly on notice" of Hofeller's (peripheral) role in this case, *id.*, is thus disingenuous and contradicted by the record. Plaintiffs could have availed themselves of various discovery mechanisms months ago if it was necessary to obtain the (irrelevant) Hofeller documents at issue. But because they, "through negligence or a tactical decision, fail[ed] to present evidence that was available, [they] may not find refuge under Rule 60(b)(2) by finding substantially similar evidence from a newly discovered source." *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 728 (10th Cir. 1993); *see Nemaizer v. Baker*, 793 F.2d 58, 62 (2d Cir. 1986) ("[A]n attorney's failure to evaluate carefully the legal consequences of a chosen course of action provides no basis for relief from a judgment."). For these reasons, too, their Rule 60(b)(2) motion should be rejected.

B. Plaintiffs' "new evidence" is not "evidence" because it is inadmissible.

In addition to not being "newly discovered," Plaintiffs have not met their burden of showing that their motion is "clearly substantiated by adequate proof." *In re Burnley*, 988 F.2d 1, 3 (4th Cir. 1992). That is because Rule 60(b)(2) relief may only be granted if the "newly discovered evidence" is admissible. *United States v. Int'l Bhd. of Teamsters*, 247 F.3d 370, 392 (2d Cir. 2001); *United States v. McGaughey*, 977 F.2d 1067, 1075 (7th Cir. 1992) *Shafiiq v. Obama*, 951 F. Supp. 2d 13, 17 (D.D.C. 2013); *Foster v. BNP Residential Properties Limited P'ship*, 2008 WL 11348323, *8 (D.S.C. Apr. 28, 2008) (denying Rule 60(b)(2) motion where alleged newly discovered information was inadmissible hearsay). More specifically, Plaintiffs have failed to properly authenticate the 2015 Hofeller study and standalone VRA paragraph purportedly authored by Hofeller, failed to demonstrate that they fall within a hearsay exception, and failed to demonstrate the relevance of these documents to their equal protection and § 1985 claims.

Plaintiffs do not contend that any exhibits attached to their motion are self-authenticating and, indeed, it is apparent from the face of the exhibits that they are not. Plaintiffs attempt to authenticate the documents attached to their motion through the declaration of an attorney in this case. Although in some circumstances an attorney declaration may be sufficient to authenticate discovery produced in the underlying litigation, particularly discovery produced from the opposing party's files, *see, e.g., Shell Trademark Mgmt BV & Motiva Enters. v. Ray Thomas Petroleum Co.*, 642 F. Supp. 2d 493, 510-11 (W.D.N.C. 2009) (collecting cases), Plaintiffs' counsel has failed to identify any personal knowledge sufficient to authenticate documents allegedly received from third parties, such as the documents identified in Plaintiffs' motion. *See Brainard v. Am. Skandia Life Assur. Corp.*, 432 F.3d 655, 667 (6th Cir. 2005) (affirming exclusion of attorney declaration seeking to authenticate documents without personal knowledge); *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 772 (9th Cir. 2002) (rejecting attorney declaration seeking to authenticate documents for lack of personal knowledge); *Disney Enter., Inc. v. Sarelli*, 322 F. Supp. 3d 413, 443 (S.D.N.Y. 2018) (rejecting attorney declaration seeking to authenticate screenshots and videos using boilerplate statement that it was "based on personal knowledge" because it was apparent that the attorney lacked personal knowledge of the documents); *Orraca v. Augustine*, 2014 WL 4265917, *4 (W.D.N.Y. Aug. 27, 2014) (rejecting attorney declaration seeking to authenticate documents because attorney lacked personal knowledge).

Plaintiffs also appear to concede that the study and paragraph purportedly authored by Hofeller lack authentication, claiming that they "can be authenticated by Stephanie Lizon, Dr. Hofeller's daughter." Pls' Mot. 10, n.4. Setting aside the dubious proposition that Hofeller's estranged daughter can authenticate these documents, which she collected long after her father's death, it is Plaintiffs' burden in moving for Rule 60(b)(2) relief to identify admissible, newly discovered evidence. Plaintiffs' tacit acknowledgement that they have failed to do so dooms their motion.

Equally fatal to Plaintiffs' motion is that the two Hofeller documents constitute inadmissible hearsay. Plaintiffs tacitly concede that they are relying upon the unpublished Hofeller study and draft paragraph for the truth of the matters asserted therein, but argue, without any legal support, that these documents are admissible as statements against interest of an unavailable witness under Federal Rule of Evidence 804(b)(3). *See* Pls' Mot. at 10, n.4. In particular, Plaintiffs contend that the statements in these documents are against Hofeller's interest because they reveal that the purpose of including a citizenship question was not for VRA enforcement. Setting aside that these documents express no such purpose or intent, Plaintiffs have failed to establish that any statement in these two documents is against Hofeller's interest.

Pursuant to Rule 804(b)(3)(A), a statement is against a declarant's interest when "a reasonable person in the declarant's position would have made [it] only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability." *See* Fed. R. Evid. 804(b)(3)(A). Moreover, "[a] statement is against pecuniary or proprietary interest when it threatens the loss of employment, or reduces the chances for future employment, or entails possible civil liability." *Gichner v. Antonio Troiano Tile & Marble Co.*, 410 F.2d 238, 242 (D.C. Cir. 1969). Here, Plaintiffs fail to explain how the statements contained in the unpublished 2015 study or standalone VRA paragraph would threaten a loss of employment or reduce the chances for future employment. There is also no basis to conclude that these statements would result in possible civil or criminal liability for anything. Indeed, it is evident from Plaintiffs' own (inadmissible) documents that the preparation of the draft study was *in furtherance* of his financial interests. *See* Pls' Ex. 1 at Ex. C p. 1 ("I've sent your invoice for processing to our accountant."). In short, Plaintiffs have failed to meet their burden of establishing a hearsay exception for the unpublished 2015 study or VRA paragraph.

Lastly, as discussed *supra*, neither the purported 2015 Hofeller study nor the standalone paragraph supposedly authored by Hofeller is legally relevant to establish the intent of Secretary Ross in deciding to include the citizenship question, or to whether he allegedly conspired to deprive anyone of a constitutional right. Accordingly, these two documents also are inadmissible under Federal Rule of Evidence 401.[9] *See United States v. Powers*, 59 F.3d 1460, 1470 (4th Cir. 1995) (affirming exclusion of irrelevant information at trial as inadmissible). That deficiency provides an independently sufficient basis to deny Plaintiffs' motion.

III. Defendants would suffer unfair prejudice if Plaintiffs were granted relief.

Finally, Rule 60(b) relief is inappropriate where, as here, the opposing party would be unfairly prejudiced. *Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993). As discussed above, the "new" Hofeller documents are relevant only if Plaintiffs are seeking to dramatically shift the theory of their case. *See supra* Section I.A. All legal bases of Plaintiffs' standing and claims throughout this case have been premised on the idea that a citizenship question will undercount certain

[9] In addition to failing to provide an evidentiary basis to consider the two documents that purport to be authored by Hofeller, Plaintiffs have failed to provide any evidentiary basis for the Court to consider Plaintiffs' Exhibits 1 and 13. Plaintiffs' counsel admits in his declaration that he lacks personal knowledge sufficient to authenticate the exhibits referenced in Plaintiffs' motion. *See* ECF No. 162-2, ¶ 1 (stating that he has "personal knowledge of the facts set forth herein *or believe them to be true based on my experience or upon personal information provided to me by others*[.]" (emphasis added)). With respect to Plaintiffs' Exhibit 1, although the Court likely can take judicial notice of the *fact* that plaintiffs in the New York census case have filed a motion to show cause, because the facts in that motion are contested, *see* Defs' Ex. G, Plaintiffs must establish an evidentiary basis for the Court to consider the contents of that filing, including its attachments. For example, Exhibit C in Plaintiffs' Exhibit 1 purports to be an email between two non-parties. This email, to the extent it is offered for the truth of the matter asserted, is hearsay (at least with respect to the statements by Stephanie Edelman), and lacks authentication. Similarly, Exhibit F in Plaintiffs' Exhibit 1 purports to be a summary by the majority staff of the U.S. House of Representatives Oversight Committee's transcribed interview of Gore. Plaintiffs have failed to properly authenticate this exhibit, and this summary of a transcribed interview constitutes hearsay within hearsay. *See* Fed. R. Evid. 805. In addition, this summary inaccurately describes Gore's testimony during his transcribed interview. *See* Defs.' Ex. H, DOJ Ltr. to Rep. Cummings (identifying inaccuracies in the House's summary of Gore's the transcribed interview).

groups. So it would be utterly unfair to Defendants if the Court were to grant Plaintiffs' untimely Rule 60(b) request on the theory that this is now a CVAP-redistricting case rather than a census-undercount case. This is especially true because Plaintiffs could have found all the "newly discovered evidence" at issue had they simply conducted more-thorough depositions.

If that unfair prejudice were not enough, Defendants would also be effectively foreclosed from appellate review of this Court's decision before the June 30, 2019 deadline for finalizing census questionnaires. *See* 30(b)(6) Dep. Designations 438:13–439:8, ECF 103-9. As a result, Defendants would be enjoined from including the citizenship question on the 2020 Census even if the Supreme Court were to rule in their favor, and thus would be required to seek an extraordinary stay pending appeal that must be briefed and decided in a matter of days. The unfairness of that prejudice is further highlighted by Plaintiffs' concurrent appellate tactics: while they seek to reopen their equal protection claim here, they are simultaneously requesting that the Fourth Circuit "enter an order invalidating the addition of the citizenship question *without* remand to the district court." Defs.' Ex F, Appellant Br. at 40 (emphasis added). It is difficult to imagine a more unfair and more prejudicial conclusion to this year-long census saga.

CONCLUSION

Plaintiffs' Rule 60(b) motion should be summarily rejected. Plaintiffs make a passing request for "limited" discovery to "supplement the record in order to enable the Court to reconsider its prior ruling." Pls' Mot. at 1-2, 9. That half-hearted request also should be denied. Plaintiffs cite no authority that would permit this Court to order discovery in this closed case, either in aid of resolving a Rule 60(b)(2) motion or more generally, while the Court's final judgment is on appeal. But even if such authority exists, Plaintiffs' conclusory request for discovery, devoid of detail or legal support, is insufficient to obtain such relief. *See Clayton v. Nationwide Mut. Ins. Co.*, 260 F. Supp. 3d 514, 521 (D.S.C. 2017) ("The court has no obligation to fashion arguments for a party or to further develop a

party's argument when it is wholly conclusory, unexplained, and unadorned with citation to legal authority."). This Court has devoted substantial judicial resources to this case and has rendered its decision. There is no basis to revisit that decision now.

DATED: June 10, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

JAMES M. BURNHAM
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

JOSHUA E. GARDNER
Special Counsel, Federal Programs Branch

/s/ Stephen Ehrlich
GARRETT COYLE
STEPHEN EHRLICH
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Counsel for Defendants

Exhibit A

U.S. Department of Justice

Justice Management Division

Office of General Counsel

Washington, D.C. 20530

DEC 12 2017

VIA CERTIFIED RETURN RECEIPT
7014 2120 0000 8064 4964

Dr. Ron Jarmin
Performing the Non-Exclusive Functions and Duties of the Director
U.S. Census Bureau
United States Department of Commerce
Washington, D.C. 20233-0001

Re: Request To Reinstate Citizenship Question On 2020 Census Questionnaire

Dear Dr. Jarmin:

The Department of Justice is committed to robust and evenhanded enforcement of the Nation's civil rights laws and to free and fair elections for all Americans. In furtherance of that commitment, I write on behalf of the Department to formally request that the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship, formerly included in the so-called "long form" census. This data is critical to the Department's enforcement of Section 2 of the Voting Rights Act and its important protections against racial discrimination in voting. To fully enforce those requirements, the Department needs a reliable calculation of the citizen voting-age population in localities where voting rights violations are alleged or suspected. As demonstrated below, the decennial census questionnaire is the most appropriate vehicle for collecting that data, and reinstating a question on citizenship will best enable the Department to protect all American citizens' voting rights under Section 2.

The Supreme Court has held that Section 2 of the Voting Rights Act prohibits "vote dilution" by state and local jurisdictions engaged in redistricting, which can occur when a racial group is improperly deprived of a single-member district in which it could form a majority. See *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). Multiple federal courts of appeals have held that, where citizenship rates are at issue in a vote-dilution case, citizen voting-age population is the proper metric for determining whether a racial group could constitute a majority in a single-member district. See, e.g., *Reyes v. City of Farmers Branch*, 586 F.3d 1019, 1023–24 (5th Cir. 2009); *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998); *Negrn v. City of Miami Beach*, 113 F.3d 1563, 1567-69 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989), *overruled in part on other grounds by Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990); see also *LULAC v. Perry*, 548 U.S. 399, 423–442 (2006) (analyzing vote-dilution claim by reference to citizen voting-age population).

The purpose of Section 2's vote-dilution prohibition "is to facilitate participation ... in our political process" by preventing unlawful dilution of the vote on the basis of race. *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997). Importantly, "[t]he plain language of section 2 of the Voting Rights Act makes clear that its protections apply to United States citizens." *Id.* Indeed, courts have reasoned that "[t]he right to vote is one of the badges of citizenship" and that "[t]he dignity and very concept of citizenship are diluted if noncitizens are allowed to vote." *Barnett*, 141 F.3d at 704. Thus, it would be the wrong result for a legislature or a court to draw a single-member district in which a numerical racial minority group in a jurisdiction was a majority of the total voting-age population in that district but "continued to be defeated at the polls" because it was not a majority of the citizen voting-age population. *Campos*, 113 F.3d at 548.

These cases make clear that, in order to assess and enforce compliance with Section 2's protection against discrimination in voting, the Department needs to be able to obtain citizen voting-age population data for census blocks, block groups, counties, towns, and other locations where potential Section 2 violations are alleged or suspected. From 1970 to 2000, the Census Bureau included a citizenship question on the so-called "long form" questionnaire that it sent to approximately one in every six households during each decennial census. See, e.g., U.S. Census Bureau, *Summary File 3: 2000 Census of Population & Housing*—Appendix B at B-7 (July 2007), *available at* https://www.census.gov/prod/cen2000/doc/sf3.pdf (last visited Nov. 22, 2017); U.S. Census Bureau, Index of Questions, *available at* https://www.census.gov/history/www/through_the_decades/index_of_questions/ (last visited Nov. 22, 2017). For years, the Department used the data collected in response to that question in assessing compliance with Section 2 and in litigation to enforce Section 2's protections against racial discrimination in voting.

In the 2010 Census, however, no census questionnaire included a question regarding citizenship. Rather, following the 2000 Census, the Census Bureau discontinued the "long form" questionnaire and replaced it with the American Community Survey (ACS). The ACS is a sampling survey that is sent to only around one in every thirty-eight households each year and asks a variety of questions regarding demographic information, including citizenship. See U.S. Census Bureau, *American Community Survey Information Guide at* 6, *available at* https://www.census.gov/content/dam/Census/programs-surveys/acs/about/ACS Information Guide.pdf (last visited Nov. 22, 2017). The ACS is currently the Census Bureau's only survey that collects information regarding citizenship and estimates citizen voting-age population.

The 2010 redistricting cycle was the first cycle in which the ACS estimates provided the Census Bureau's only citizen voting-age population data. The Department and state and local jurisdictions therefore have used those ACS estimates for this redistricting cycle. The ACS, however, does not yield the ideal data for such purposes for several reasons:

- Jurisdictions conducting redistricting, and the Department in enforcing Section 2, already use the total population data from the census to determine compliance with the Constitution's one-person, one-vote requirement, see *Evenwel v. Abbott*, 136 S. Ct. 1120 (Apr. 4, 2016). As a result, using the ACS citizenship estimates means relying on two different data sets, the scope and level of detail of which vary quite significantly.

- Because the ACS estimates are rolling and aggregated into one-year, three-year, and five-year estimates, they do not align in time with the decennial census data. Citizenship data from the decennial census, by contrast, would align in time with the total and voting-age population data from the census that jurisdictions already use in redistricting.

- The ACS estimates are reported at a ninety percent confidence level, and the margin of error increases as the sample size—and, thus, the geographic area—decreases. See U.S. Census Bureau, *Glossary: Confidence interval (American Community Survey), available at* https://www.census.gov/glossary/#term_ConfidenceintervalAmericanCommunity Survey (last visited November 22, 2017). By contrast, decennial census data is a full count of the population.

- Census data is reported to the census block level, while the smallest unit reported in the ACS estimates is the census block group. See *American Community Survey Data* 3, 5, 10. Accordingly, redistricting jurisdictions and the Department are required to perform further estimates and to interject further uncertainty in order to approximate citizen voting-age population at the level of a census block, which is the fundamental building block of a redistricting plan. Having all of the relevant population and citizenship data available in one data set at the census block level would greatly assist the redistricting process.

For all of these reasons, the Department believes that decennial census questionnaire data regarding citizenship, if available, would be more appropriate for use in redistricting and in Section 2 litigation than the ACS citizenship estimates.

Accordingly, the Department formally requests that the Census Bureau reinstate into the 2020 Census a question regarding citizenship. We also request that the Census Bureau release this new data regarding citizenship at the same time as it releases the other redistricting data, by April 1 following the 2020 Census. At the same time, the Department requests that the Bureau also maintain the citizenship question on the ACS, since such question is necessary, *inter alia*, to yield information for the periodic determinations made by the Bureau under Section 203 of the Voting Rights Act, 52 U.S.C. § 10503.

Please let me know if you have any questions about this letter or wish to discuss this request. I can be reached at (202) 514-3452, or at Arthur.Gary@usdoj.gov.

Sincerely yours,

Arthur E. Gary

Arthur E. Gary
General Counsel
Justice Management Division

Exhibit B

From: Bailey, Kate (CIV)
To: Freedman, John A.; Federighi, Carol (CIV); Ehrlich, Stephen (CIV); Coyle, Garrett (CIV); Wells, Carlotta (CIV)
Cc: DHo@aclu.org; Cc: Khan, Sania; asenteno@MALDEF.org; Todd Grabarsky; Raines, Chase; Thomas, Tina; Goldstein, Elena; Colangelo, Matthew; Gabrielle.Boutin@doj.ca.gov; Duraiswamy, Shankar; Matthew Wise; Rosenberg, Ezra; "Case, Andrew"
Subject: RE: Remaining discovery productions
Date: Tuesday, October 23, 2018 5:43:53 PM
Attachments: DOJ00039722.pdf
DOJ00039725.pdf
DOJ00039728.pdf
DOJ00039730.pdf
DOJ00039733.pdf
DOJ00039735.pdf
DOJ00039736.pdf
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DOJ00039759.pdf
DOJ00039760.pdf
DOJ00039764.pdf
DOJ00129991.pdf
Def."s R&Os to Census RFAs FINAL.pdf
DOJ00129977.pdf

Counsel,
Attached please find:

- Corrected versions of the documents we produced to you on October 9th in response to Judge Furman's order (these now contain both old and new bates numbers, for your reference)
- DOJ 15199 and DOJ 15200, which, as referenced in my email below, we have determined we can produce in full (the attachments show both old and new bates numbers, for your reference)
- Defendants' responses to NYIC Plaintiffs' requests for admission to Census

Regarding the full transcripts from the CBAMS focus groups, as promised, here is Dr. Abowd's explanation as to why the transcripts themselves cannot be subject to disclosure:

> The transcripts from the 42 focus groups conducted as a part of the 2018 Census Barriers, Attitudes and Motivators Study were collected under the authority of Title 13 of the U.S. Code and are protected under Sections 9(a)(3) and 214 in exactly the same manner as the individual response data from a survey or census. As such, their release is subject to the approval of the Disclosure Review Board under the supervision of the Data Stewardship Executive Policy Committee, chaired by the Chief Operating Officer at the Census Bureau.
>
> The OMB-approved Consent Form for these focus groups said:
> **Are my answers confidential?**
> Yes. The U.S. Census Bureau is required by law to protect your information (13 U.S.C. § 9 and § 214). The Census Bureau is not permitted to publicly release your responses in a way that could identify you or your household.

https://www.reginfo.gov/public/do/DownloadDocument?objectID=79530702

The DRB has an approved protocol for reviewing and releasing redacted transcript summaries, after-action reports, and scientific articles based on the analysis of focus group transcripts. It does not have any approved protocol for releasing full transcripts. Because current research shows that there is no reliable collection of algorithms for providing acceptable disclosure avoidance in the full transcripts, there is no plan to approve a protocol that would allow the DRB to release full transcripts.

Thank you,

Kate Bailey
Trial Attorney
United States Department of Justice
Civil Division – Federal Programs Branch
20 Massachusetts Avenue, NW
Room 7214
Washington, D.C. 20530
202.514.9239 | kate.bailey@usdoj.gov

From: Bailey, Kate (CIV)
Sent: Tuesday, October 23, 2018 3:23 PM
To: Freedman, John A. <John.Freedman@arnoldporter.com>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>; Coyle, Garrett (CIV) <gcoyle@CIV.USDOJ.GOV>; Wells, Carlotta (CIV) <CWells@CIV.USDOJ.GOV>
Cc: DHo@aclu.org; Cc: Khan, Sania <Sania.Khan@ag.ny.gov>; asenteno@MALDEF.org; Todd Grabarsky <Todd.Grabarsky@doj.ca.gov>; Raines, Chase <Chase.Raines@arnoldporter.com>; Thomas, Tina <TThomas@cov.com>; Goldstein, Elena <Elena.Goldstein@ag.ny.gov>; Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Gabrielle.Boutin@doj.ca.gov; Duraiswamy, Shankar <sduraiswamy@cov.com>; Matthew Wise <Matthew.Wise@doj.ca.gov>; Rosenberg, Ezra <erosenberg@lawyerscommittee.org>; 'Case, Andrew' <ACase@manatt.com>
Subject: Remaining discovery productions

Counsel,

In accordance with Judge Furman's order at last week's status conference, I write to provide most of the outstanding written discovery productions.

- Today we overnighted materials to the NYAG's offices and sent the same materials by courier to Arnold and Porter's DC offices.
  - Production letters for DOJ Productions 6, 7, and 8 are attached, as well as the accompanying privilege logs.
  - Production 7 is on an encrypted flash drive because it was too large to fit on CDs. The password for the drive is 333774206277, and instructions for use are included in the box. Kindly return the flash drives to us after you've copied the files, please. The remaining productions are on CDs, and the password is F3dprg20M!!!

- Production 7 includes several "dead," or missing bates numbers, due to an inadvertent error on our end. The production was too large for us to re-run once we discovered those errors, so please understand that any missing bates numbers you observe in Prod007 are intentional.
- In response to Dale Ho's email of 10/7, we previously produced 115 documents without bates numbers. Today we have also transmitted bates numbered versions of these documents. We did not previously address DOJ 15200, but we have determined that that document can be released in full. It will be provided by separate email later today.
- In response to the DOJ doc issues raised in John Freedman's email of October 5th at 8:32 am, you requested that we produce email chains represented at DOJ 14907, 14922, 14996, 15002, 15006, 30720, 30723 and 30725. We have determined that we can release this chain in full, and these documents are attached to this email.
- You requested more information about DOJ 15197, 15198, 15199, and 15200. These documents were in hard copy, and therefore no metadata exists for author, recipient, date, or time. These materials were collected from John Gore. As noted above, we have determined that DOJ 15200 can be released in full. In addition, we have determined that DOJ 15199 can be released in full, and will be coming later this afternoon. As noted in the privilege log entry for DOJ 15198, it is a copy of the Uthmeier memo provided to Gore, and DOJ 15198 is a note that accompanied DOJ 15197. These documents will not be released.
- Also attached are the production letter and privilege log for Commerce Production 6.
- On Thursday, 10/8, Elena wrote to us requesting the basis for our request to claw back two documents. The replacement documents also are attached. Information has been redacted as privileged in these two documents for the reasons set forth in the privilege log for the same redactions in COM_DIS00014369, Row 114.

- Also attached to this email are Defendants' responses to NYIC Plaintiffs' RFAs to the Department of Commerce and responses to the Third Interrogatories to all Defendants. Responses to NYIC Plaintiffs' RFAs to Census will be coming later today.
- By separate email momentarily, I will be providing you re-produced versions of the documents we produced on October 9th in response to Judge Furman's order—the new versions have both the original and new bates numbers.
- Sahra Park-Su is available for deposition this Thursday. David Langdon is available this Friday and, per my earlier email, John Gore's earliest date of availability also is Friday.

Kate Bailey
Trial Attorney
United States Department of Justice
Civil Division – Federal Programs Branch
20 Massachusetts Avenue, NW
Room 7214
Washington, D.C. 20530
202.514.9239 | kate.bailey@usdoj.gov

John H. Thompson
Director,
Bureau of the Census
US Department of Commerce
Washington, DC 20233

Dear Mr Thompson:

We are writing to formally request the reinstatement of a question on the 2020 Census questionnaire relating to citizenship. The Department seeks to reinstate the question because of recent Court decisions _____ where courts required enumerated (block level) data related to voting age population. This data can only be provided based on enumerated (Census), rather than sample (ACS) data.

We are aware that the 2010 Census was the first decennial census since the 1880 Census without a question about citizenship. We also note that the American Community Survey, which replaced the "long form" version of the questionnaire in the decennial 2000 Census, asks a question about citizenship. We are not aware that of any serious concerns relating to the presence of a citizenship question on the ACS.

We understand that the Bureau personnel may believe that ACS data on citizenship was sufficient for redistricting purposes. We wanted the Bureau to be aware that two recent Court cases have underscored that ACS data is not viable and/or sufficient for purposes of redistricting. Two important citations from these cases are as follows:

_____

We note that in these two cases, one in 2006 and one in 2009, courts reviewing compliance with requirements of the Voting Rights Act and its application in legislative redistricting, have required Latino voting districts to contain 50% + 1 of "Citizen Voting Age Population (or CVAP). It is clear that full compliance with these Federal Court decisions will require block level data than can only be secured by a mandatory question in the 2020 enumeration. Our understanding is that data on citizenship is specifically required to ensure that the Latino community achieves full representation in redistricting.

We accordingly request that the Bureau prepare, without delay, the appropriate question on citizenship for the 2020 Census, and submit this addition for 2020

Census for OMB Review and other appropriate notifications.

Please let me know if you have any questions about his letter or wish to discuss this subject. I can be reached at (202) ------- or _____@doj.gov.

Sincerely yours,

Attachment.

Cc:

Exhibit C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - -x

NEW YORK IMMIGRATION COALITION, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Defendants.

- - - - - - - - - - - - - - - - -x

Case No.

1:18-CF-05025-JMF

Friday, October 16, 2018
Washington, D.C.

Videotaped Deposition of:

JOHN GORE,

called for oral examination by counsel for the Plaintiffs, pursuant to notice, at the law offices of Covington & Burling, LLP, One City Center, 850 Tenth Street, Northwest, Washington, D.C. 20001-4956, before Christina S. Hotsko, RPR, CRR, of Veritext Legal Solutions, a Notary Public in and for the District of Columbia, beginning at 9:05 a.m., when were present on behalf of the respective parties:

the judgment of the Census Bureau from publicly available information. Secretary Ross issued a memo of decision with respect to the letter that the Department of Justice submitted in which he decided, among other things, to order reinstatement of the citizenship question on the census questionnaire.

I also had watched at least portions of the May 8th hearing before the committee that you referenced earlier, and understood from testimony at that hearing that that was the position of the Census Bureau.

Q. So when you say the judgment of the Census Bureau, whose judgment, if you could identify individuals, are you referring to?

A. Secretary Ross would be one. And the other would be -- I can't remember who it was who testified at the hearing, but it was whoever testified at the hearing about the accuracy of a hard count versus an estimate. It may have been Ron Jarmin or somebody else. I just can't remember.

Q. May 8th -- the May 8th hearing?

A. The May 8th hearing, yeah.

Q. And when you say Ron Jarmin, you're referring to the acting director of the Census Bureau?

A. That's who I understand he is. I've never met him.

Q. When you testified that it was the judgment of the Census Bureau that CVAP data collected through the decennial enumeration would be more accurate, what did you mean by more accurate?

A. As I understand the judgment of the Census Bureau, it's that the hard count would be more accurate than an ACS estimate because an ACS estimate has a margin of error associated with it and also requires an extrapolation because, as you're no doubt aware, the ACS estimates are only released at the block group level, and so further extrapolation is required to estimate CVAP levels at the block level.

And it was my understanding, from

Secretary Ross' memo and the testimony that I believe I heard on May 8th, that the Census Bureau believed that a hard count would be more accurate than estimates of an extrapolation with an associated margin of error.

Q. And just so we're clear on your understanding, your understanding is that, in the judgment of the Census Bureau, it would be more accurate to have CVAP data collected through the decennial enumeration than the existing ACS data for two reasons: One, the decennial enumeration data is a hard count and not an estimate; and, two, the decennial enumeration data is available at the census block level, and so you wouldn't have to perform an estimation procedure the same way that you do with the ACS; is that right?

MR. GARDNER: Objection. Compound.

THE WITNESS: As I understand your question, I believe that was Secretary Ross' judgment on behalf of the Department of Commerce, of which the Census Bureau is part. I don't have his memo right in front of me, so I can't -- I'm

going off of my memory rather than a document that's in front of me. But my recollection of that is that he analyzed a number of different options and concluded that reinstating the question on the census questionnaire, in addition to other data, would provide the most accurate and complete picture of data for the Department of Justice's purposes.

BY MR. HO:

Q. Now, all things being equal, the Department of Justice would want to use the CVAP data that was, in the Census Bureau's view, the more accurate data available, correct?

A. I think that's probably correct. I guess I could imagine a scenario, which I don't know is present here or not, where we would make a different judgment as to what was more accurate than the Census Bureau might. But that's correct.

Q. When you say we would make a different judgment as to what is more accurate than the Census Bureau might, who's we?

A. The Department of Justice.

Q. Who's we at the Department of Justice who is in a position to make an assessment as to whether or not CVAP data is more accurate than the Census Bureau?

A. I don't know. I can't point to any individual person. But, of course, we're constantly reviewing the data, the various data sources, the academic literature. We send people to conferences so that we can understand the latest about data in this area and other demographic areas.

But I don't believe there's any dispute at this point about what would be more accurate. And the Census Bureau is charged to make that judgment, as I understand it, as a matter of law.

Q. Do you think you're better situated than career Census Bureau professionals to make an assessment as to the accuracy of various forms of CVAP data?

A. Me personally?

MR. GARDNER: Objection to form.

THE WITNESS: Me personally?

BY MR. HO:

Q. Yes.

A. No, I don't.

Q. Let's look at page 2 of your testimony. Oh, I'm sorry --

A. It appears to be a list of the committee members' names.

Q. Yeah.

A. I'm happy to review that.

Q. We'll come back to that.

Let's look at page 37 of your testimony. So the second-to-last question here is from Representative Krishnamoorthi. And he asks you, "Let me shift to another issue, which is, is the DOJ aware of any study, analysis, or projection of how the inclusion of the citizenship question will affect the response rate for the census?"

Your response was, "That's a great question, Congressman. I don't know the Department of Justice is aware of that. That's really a question for the Department of Commerce and the Census Bureau, since it is the Secretary

of Commerce's province to decide which questions get included or are not within the bounds set by law."

When Representative Krishnamoorthi used the term --

A. Can you read the rest of my answer for completeness?

Q. "My understanding is that, from Secretary Ross' memo, that he took a hard look at that issue and didn't find empirical evidence to suggest that the question would lead to a reduction in response rates. That's based on the memo of decision that he issued. I obviously can't speak on his behalf."

Did I read that right?

A. Thank you. Yes.

Q. When the representative uses the term "response rates," what did you understand him to mean?

A. I understood him to be suggesting that adding a question and, in particular, reinstating a citizenship question might cause people not --

some incremental number of people not to answer the -- that question or fill out the census form.

Q. And your testimony was, on May 21st, that DOJ was not aware of any analysis indicating that the inclusion of the citizenship question will affect response rates to the census?

MR. GARDNER: Objection. Mischaracterizes the document.

THE WITNESS: I think what I've testified to is -- is what is here in the record, and that answer speaks for itself.

BY MR. HO:

Q. Well, what did you mean by that? Were you aware of any analysis as to whether or not including the citizenship question on the census could affect the rate at which the people respond to the census?

A. As I said then, and as I sit here today, no, I'm not aware of any -- any data on that issue. And as I further explained, Secretary Ross in his memo explains that he took a hard look at that issue and found no empirical evidence to

support the conclusion that there be a reduction in response rates from reinstatement of the citizenship question on the census questionnaire.

Q. One more question about your testimony for now. On page 27, the last question on the page from Representative Gowdy: "So if Secretary Ross wanted to include a question, what's your favorite movie, how would a court determine whether or not that was an appropriate question? I mean, I guess what I'm getting at is, what is the standard by which you judge the legitimacy of the inclusion or exclusion of a question on the census form?"

Your response: "I think that is a very good question. It's probably better directed to the commerce department. I'm not involved in the litigation. That's being handled out" -- and then you got cut off.

What do you mean when you testified on May 21st that you're not involved in the litigation over the citizenship question?

A. I am not a counsel of record in that

your letter from Justice to the Census Bureau went out requesting a citizenship question, what were you aware of with respect to the nature of those pre-September 8th conversations?

MR. GARDNER: Same objection. Same instruction.

THE WITNESS: I can tell you that I was aware of the fact that conversations had occurred. And beyond that, I don't believe I can give an answer in light of the instruction I've just received.

BY MR. HO:

Q. When you say that you were aware of the fact that conversations occurred, what do you mean by conversations?

A. I mean -- a conversation is a communication between two or more people, and I was aware that two or more people had talked to each other.

Q. When you say that you were aware that two or more people had talked to each other, which people were you aware had talked to each other?

A. It was my understanding that somebody from Commerce had spoken to Mary Blanche Hankey, that someone had spoken to James McHenry, and that Secretary Ross had spoken to the attorney general.

Q. And that all of those conversations were about the inclusion of a citizenship question on the census?

A. I wasn't a party to those conversations, but my understanding is that they would have touched on that issue.

Q. James McHenry is the director of the Executive Office for Immigration Review within DOJ, correct?

A. He is now, although at that time he wasn't. At that time, he was on detail to the Office of the Associate Attorney General. And he had come from somewhere else. I can't remember. I think it was OCAHO, which is -- since we're in D.C. and talking about government things, it's an acronym that -- I don't know what it stands for. But Mr. McHenry has been involved -- has been an employee of the department for some time, but in

conversation I had with Mr. Gary about this took place around Halloween.

BY MR. HO:

Q. My question wasn't about --

A. 2017.

Q. My question wasn't about your next interaction with Mr. Gary.

A. Oh, I'm sorry.

Q. It was just your next interaction about the citizenship question on the decennial census.

A. I see.

Q. After this e-mail exchange with Mr. Gary, when was the next interaction that you had about the issue of a citizenship question on the decennial census?

A. That's a fair question. Around the -- I don't know -- I guess I don't know which was the next communication I had or who it was with.

Q. Okay.

A. I was communicating with various individuals at that time about the issue.

Q. Have you ever discussed the issue of the

citizenship question with Secretary Ross?

A. No.

Q. Prior to May 2017 -- so I'm changing the time period here a little bit --

A. Sure.

Q. -- had you ever raised the issue of a citizenship question on the decennial census questionnaire?

A. No.

Q. Were you consulted by Secretary Ross regarding whether the Department of Justice would support or request the inclusion of a citizenship question on the decennial census?

MR. GARDNER: Objection. Vague.

THE WITNESS: No.

BY MR. HO:

Q. Were you consulted by Secretary Ross' staff regarding whether the Department of Justice would support or request inclusion of a citizenship question on the census?

MR. GARDNER: Same objection.

THE WITNESS: Who do you mean by staff?

BY MR. HO:

Q. Anyone who works in the front office of the Department of Commerce. Were you ever consulted by front office Department of Commerce employees -- that's what I mean by Secretary Ross' staff --

A. Okay.

Q. -- regarding whether the Department of Justice would support or request the inclusion of a citizenship question on the census?

MR. GARDNER: Same objection.

THE WITNESS: I guess I'm still not clear on what you mean by the front office of the Department of Commerce. I can recall speaking to, I believe, three individuals at the Department of Commerce about this issue.

BY MR. HO:

Q. Who are the three individuals at the Department of Commerce --

A. Sure.

Q. -- that you spoke to about the citizenship question on the census?

A. I didn't mean to cut you off, and I apologize, again, to the court reporter for being a fast talker.

I recall speaking to Peter Davidson, James Uthmeier, U-T-H-M-E-I-E-R -- and Wendy Teramoto.

Q. When was the first occasion on which you consulted with one of those three individuals about the inclusion of a citizenship question on the census?

A. I'm not sure I would describe it as a consultation as much as I would describe it as a conversation about various issues related to the reinstatement of a citizenship question on the census questionnaire. I can recall having conversations starting sometime around this September 2017 time frame.

Q. Who was the first of those three individuals that you had a conversation with about the inclusion of a citizenship question on the 2020 census?

A. Peter Davidson.

Q. And roughly when was your first conversation with Peter Davidson about including a citizenship question on the 2020 census?

A. I don't recall exactly, but I would say it was probably around mid-September of 2017 or somewhere in that time frame.

Q. After you spoke to Mr. Davidson in mid-September, what was the next conversation that you had among those three individuals from Commerce about the citizenship question?

A. I don't recall exactly when it was. I had several conversations with Peter Davidson beginning in September and continuing through December. I had a couple of conversations as well with Mr. Uthmeier, including at least one between just Mr. Uthmeier and me and one, and maybe two, where Mr. Uthmeier and Peter Davidson were both involved. Then I had a conversation at one point with Wendy Teramoto about a scheduling issue that I think took place in October of 2017, but I don't recall exactly. Somewhere in that time frame.

Q. Roughly when was your first conversation

with Mr. Uthmeier about the citizenship question?

A. I think it would have been either late September or sometime in October of 2017.

MR. HO: We've been going for a little over an hour, about an hour-ten. Would now be an okay time for a first break?

MR. GARDNER: That's fine with me, yeah.

MR. HO: Great.

VIDEO TECHNICIAN: This concludes media unit number 1. The time on the video is 10:19 a.m. And we are off the record.

(A recess was taken.)

VIDEO TECHNICIAN: This begins media unit number 2. The time on the video is 10:37 a.m. We are on the record.

BY MR. HO:

Q. Mr. Gore, I just want to follow up on something from before the break. The communications between the Department of Justice and the Department of Commerce about the citizenship question, those communications were not initiated by the voting section, correct?

the 2020 census questionnaire, correct?

A. Correct.

Q. Is it fair to say that you wrote the first draft of the letter from the Department of Justice to the Census Bureau requesting a citizenship question on the 2020 census questionnaire?

A. Is that a question? I'm sorry. That sounded like a statement.

Q. No. It was a question.

A. Okay.

Q. Is it fair to say that you wrote the first draft of the letter from the Department of Justice to the Census Bureau requesting a citizenship question on the 2020 census questionnaire?

A. Yes.

Q. You write in this e-mail that you discussed the draft letter with Mr. Herren yesterday.

Would that have been your first conversation with Mr. Herren about the citizenship

was conveying there is that Mr. Gary didn't need to work late on a Friday night during the holiday season to send the letter out.

Q. So just so I understand the process here, you had -- you first had communications about the issue of a citizenship question sometime around Labor Day of 2017, correct?

A. Give or take, yes, that's correct.

Q. You drafted the initial draft of the letter to request the citizenship question sometime around the end of October or early November of 2017, correct?

A. Correct.

Q. The conversations to add the citizenship question with the Department of Commerce were not initiated by the civil rights division, correct?

A. Correct.

Q. And they were not initiated by the Department of Justice, correct?

A. That's my working understanding.

Q. Around the time that you wrote the first draft of this letter, you received input from

three individuals: Mr. Herren, Ms. Pickett, and Mr. Gary, correct?

A. Yes. And I may have received input from others as well.

Q. Around the time of the first draft of the letter in early November of 2017, who else did you receive input from other than Mr. Herren, Ms. Pickett, and Mr. Gary?

A. Mr. Aguinaga would have provided -- may have provided some input. I would have had discussions on -- regarding the letter generally with Patrick Hovakimian, who at the time was detailed to the Office of Associate Attorney General, and with Jesse Panuccio in the Office of the Associate Attorney General.

And I had various conversations with others at various times throughout this process. But I don't recall who else I would have spoken to at that particular moment in time, around November 1st of 2017.

Q. Okay. Around November 1st of 2017, the only career staff in the civil rights division

from whom you received input on the letter was from Mr. Herren, correct?

A. That's correct.

Q. After that period of early November of 2017 when you had drafted the initial draft of that letter, Mr. Herren gave you some edits, correct?

A. That's correct.

Q. After that time, did you receive any further edits from Mr. Herren to the draft letter?

A. I don't recall one way or the other.

Q. So you have no recollection of receiving input from career civil rights division staff on the letter requesting a citizenship question other than that one occasion in early November around the time of the first draft from Mr. Herren, correct?

A. I believe that's correct. Yeah.

Q. You continued to revise the letter after early November of 2017 with input from different people. But after that first round of edits from Mr. Herren, you received no subsequent edits from

people who were career staff in the civil rights division, correct?

MR. GARDNER: Objection. Compound.

THE WITNESS: To the extent I understand your question, I believe that's correct.

BY MR. HO:

Q. During this period when you were revising the letter to request a citizenship question, you had multiple conversations with legal staff at the Department of Commerce, correct?

A. Yes.

Q. And the edits that you were receiving to the letter from other DOJ personnel included political appointees in the front office of the Department of Justice and in the front office of the civil rights division, correct?

A. I -- certainly that's correct with respect to the leadership offices at the Department of Justice. I can't remember if I was receiving edits from the front office of the civil rights division at that time after receiving the edits from Ms. Pickett.

Q. Who made the final decision to send the letter requesting the citizenship question be added to the 2020 census questionnaire?

A. I'm not sure I know. And I can't recall who communicated the final decision to me.

Q. The letter was ultimately sent on December 12th, 2017 --

A. Correct.

Q. -- correct?

A. Correct.

Q. Who gave the final signoff to put that letter in the mail?

MR. GARDNER: Objection. Asked and answered.

THE WITNESS: I don't recall who gave the final signoff.

BY MR. HO:

Q. Was it you?

A. No, I don't believe I would have given the final signoff. But maybe. I guess it depends on what you're asking. Like, who told Art Gary he could press "send" on the e-mail? I don't

understand your question.

Q. Yes, that's my question.

A. I don't know.

Q. You don't know whether or not you did?

A. I don't recall whether it was me or somebody else.

Q. All right.

A. It's possible it could have been me.

(Gore Deposition Exhibit 17 marked for identification and attached to the transcript.)

BY MR. HO:

Q. I'm going to show you what's been marked as Exhibit 17. This is a document in the administrative record, the first page of which has the number 000663. This is a letter stamped December 12th, 2017, from Arthur Gary at the Department of Justice addressed to Ron Jarmin at the Census Bureau, correct?

A. Yes. It appears to be.

Q. And this is the letter we've been talking about in which the Department of Justice

with Arthur Gary about the decision over whether or not to meet with Census Bureau personnel to discuss their proposal to produce block-level CVAP data without a citizenship question?

A. I have no awareness on that one way or the other.

Q. Dr. Jarmin is correct that DOJ leadership did not want to meet to discuss the technical aspects of the citizenship question request, correct?

A. I'm sorry, can you repeat that question?

Q. Dr. Jarmin was correct that DOJ leadership did not want to have a technical meeting to discuss DOJ's request for block-level CVAP data, correct?

A. I believe that's correct.

Q. The reason you didn't want to have that meeting is because it was more important to the Department of Justice to get a citizenship question on the 2020 census questionnaire than to get accurate block-level CVAP data, correct?

MR. GARDNER: Objection. Calls for

information subject to deliberative process privilege.

To the extent you can answer that question without divulging privileged information, you may do so. Otherwise, I instruct you not to answer.

THE WITNESS: Consistent with that instruction, the answer I can give is that Secretary Ross determined in his memo of decision that the best possible way to proceed is the way that he approved. And he specifically considered and rejected an alternative that called for comparing administrative records and other information, survey data, already available to the Census Bureau.

MR. HO: Well, I know we haven't been going for all that long, I just drank a little too much coffee. I apologize, but I think I need to take a --

MR. GARDNER: You don't need to talk about that on the record. It's okay.

MR. HO: I can talk about it more on the

substantial lowering of the response rate."

Do you see that?

A. Yes.

Q. Now, Mr. Gore, when you testified in Congress that you were not aware of any analysis that the citizenship question would reduce response rates to the census, you didn't mention the fact that you had received multiple e-mails from -- one from Chris Herren and at least one from Arthur Gary that referenced analyses indicating that the inclusion of a citizenship question would reduce response rates, correct?

MR. GARDNER: Objection. Mischaracterizes the documents.

THE WITNESS: That, again, is a gross mischaracterization of this document. This document doesn't contain any analysis on that question. It simply conveys that the authors of the document purport to hold the opinion that there would be a certain result.

Moreover, the New York Times article doesn't contain any analysis. It contains quotes

from people who hold a particular view or opinion, but there's no analysis or data on that question.

Secretary Ross, when he took a hard look at this, from what I understand based on the publicly available memo of decision, didn't find any empirical evidence to support that view, claim, or opinion.

So this is not an analysis of that issue.

BY MR. HO:

Q. Okay. So as of the date of your testimony in Congress, you were aware that people had the opinion that the citizenship question would reduce response rates, right?

A. Yes.

Q. Okay. But you're saying the reason you didn't mention that is because you believe that was an opinion but not analysis, correct?

MR. GARDNER: Objection. Mischaracterizes the witness' testimony.

THE WITNESS: I believe the -- and again, I don't have the testimony in front of me. I'm happy to look back at the transcript. I believe I

redistricting should be conducted using total population or some other measure?

A. I imagine I have. Yes.

Q. And do you recall any of those conversations that are not covered by deliberative privilege?

A. No.

Q. So every conversation that you've ever had is covered by deliberative privilege with regard to this citizenship question issue?

MR. GARDNER: Objection. Mischaracterizes the witness' previous testimony.

THE WITNESS: I would say conversations that I can recall that have taken place while I've been employed by the Department of Justice would all fall within that category, that's correct. It's possible that I had conversations regarding that topic while I was in private practice, but those obviously were before my time serving in the government and wouldn't relate to this particular letter.

There was a case that went to the Supreme

Court a couple of terms ago, the Evenwel versus Abbott case, which raised this issue, and I may have discussed that case or read the briefs in that case while I was still in private practice.

BY MS. HULETT:

Q. Did you have an opinion as to whether or not Evenwel was decided correctly by the U.S. Supreme Court?

A. At what point in time?

Q. After the opinion came out.

A. Yeah, the opinion came out while I was in private practice, and I believe I had an opinion on that.

Q. And what was your opinion on that at that time?

A. That it was correctly decided.

Q. Have you had any conversations with any state officials -- let me start again.

Have there been any state officials that communicated to the Department of Justice about the possibility of using data other than total population for redistricting purposes?

A. I don't know -- I can't speak for other individuals in the Department of Justice. I can tell you that no state official has communicated with me about that. Whether some state official has communicated with some other person associated with the Department of Justice, I don't know.

Q. I'm going to ask you a few questions about Section 203. Are you familiar with Section 203 of the Voting Rights Act?

A. Yes.

Q. And do you agree that Section 203 requires the director of the census to determine which jurisdictions meet the requirements for coverage under Section 203?

A. Yes, I do.

Q. And in order to make that determination, do you agree that it's necessary to estimate the total population of voting age persons who are citizens?

A. Yes. I believe that's correct.

Q. And that the permitted data source for those estimates are the most current available ACS

data; isn't that correct?

A. That is correct. Those determinations have to be made by the Census Bureau every five years. And I believe that the ACS data is specifically mentioned in the statute that Congress enacted directing the Census Bureau to make those determinations.

I believe that the Gary letter also mentions that issue in the last or second-to-last paragraph.

Q. So you would agree, then, that whether or not the short form contains the citizenship question, the data for Section 203 coverage will continue to come from the ACS or will have to continue to come from the ACS?

A. I -- some data related to 203 will continue to come from the ACS because those determinations are made every five years.

I can't remember the wording of the statute precisely as to whether the Census Bureau is required to consider that data or can use other data. It may be permitted to use other data as

well. But I'm familiar that its current practice is to use the ACS data.

And the decennial census data obviously is only available every ten years, not every five years.

Q. I'd like to draw your attention back to this Exhibit 17, which is the December 12th, 2017 -- I think we've been referring to it as the Gary letter.

A. Yes. Bear with me one moment. My exhibits are not in order.

Q. Okay.

A. Let me see if I can find it. Got it. Thank you.

Q. When you were -- do you see that you've cited several cases in this letter?

A. I see that the department has cited several cases in the letter. Yes.

Q. You drafted -- did the initial draft of this letter, correct?

A. That is correct.

Q. And when you were drafting the letter,

did you, personally, do the research that resulted in the citation to these particular cases or did someone else do it for you and send them to you?

MR. GARDNER: Objection. Calls for information subject to deliberative process privilege. I instruct the witness not to answer.

THE WITNESS: Consistent with that instruction, I can't answer.

BY MS. HULETT:

Q. So you can't tell me whether you chose these cases or whether someone else chose these cases for inclusion in the letter because that's deliberative process? I just want to make sure I understand what you're refusing to answer.

A. Yes. That's on the instruction of counsel.

Q. Okay. Did you read the opinions that are cited in the letter?

A. Yes, I did.

Q. How recently have you read the opinions?

A. Well, let me look at which opinions we're talking about.

not have authority or standing to assert such constitutional claims. The Department of Justice has, in the past, gotten involved in racial gerrymandering claims, either as an intervener or as an amicus because frequently those claims implicate districts that were drawn or preserved to comply with Section 2 or Section 5 of the Voting Rights Act, which the Department of Justice does enforce.

Q. So a citizenship question would not help DOJ bring racial or partisan gerrymandering claims because DOJ doesn't have jurisdiction to bring them in the first place, correct?

A. That's correct, although it would facilitate DOJ's participation in such cases if it chose to participate for -- because, again, particularly, racial gerrymandering cases can implicate Section 2 and Section 5 districts where CVAP data is not necessary.

Q. Prior to December 12th, 2017, did you have any communication with anybody who was not a federal employee at the time about having a

citizenship question on the census?

A. Yes.

Q. Who?

A. I had a conversation with a gentleman named Mark Neuman, who I believe was not a federal employee at the time.

Q. Who is Mark Neuman?

A. I understand Mark Neuman to be a former employee of the Census Bureau or the Department of Commerce -- I'm not sure which one. And I understood that he was advising the Department of Commerce and the Census Bureau with respect to this issue.

Q. And what was the substance of your conversation with Mr. Neuman?

MR. GARDNER: Objection. Calls for information subject to deliberative process privilege. I instruct the witness not to answer.

THE WITNESS: Consistent with that instruction, I can't answer.

BY MR. GREENBAUM:

Q. Other than Mr. Neuman, did you have a conversation with anybody else -- or a communication with anybody else who was not an employee of the federal government about having a citizenship question on the census?

A. No.

Q. Did you communicate with anybody employed by the Census Bureau about the issue of putting a citizenship question on the census prior to December 12th, 2017?

A. No, I don't believe so.

Q. Do you know anybody at DOJ who did?

A. I don't know one way or the other.

Q. Did DOJ consider privacy issues related to revealing a person's citizenship data or -- strike that.

Prior to the issuance of the December 12th letter, did you, John Gore, consider privacy issues related to revealing a person's citizenship status if citizenship data was taken from -- was at the individual level or at the block level on the census?

Exhibit D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBYN KRAVITZ, et al., Plaintiffs, vs. U.S DEPARTMENT OF COMMERCE, et al., Defendants.	Civil Action No. 8:18-cv-01041-GJH Hon. George J. Hazel
LA UNION DEL PUEBLO ENTERO; et al., Plaintiffs, vs. WILBUR L. ROSS, sued in his official capacity as U.S. Secretary of Commerce, et al., Defendants.	Civil Action No. 8:18-cv-01570-GJH Hon. George J. Hazel

VIDEOTAPED DEPOSITION OF A. MARK NEUMAN
Taken on behalf of Plaintiffs
October 28, 2018
(Starting time of the deposition: 12:22 p.m.)

Veritext Legal Solutions
Mid-Atlantic Region
1250 Eye Street NW - Suite 350
Washington, D.C. 20005

knew.

Q. (By Mr. Duraiswamy) That's fair. So you mentioned a few minutes ago that the citizenship question was something that came up during the transition. Who did you talk to about a potential citizenship or immigration question on the 2020 census during the transition?

A. I'm sure I would have talked to people in the Commerce team, and I'm sure -- and I'm sure Tom Hoffler would have talked to me.

Q. When you say "people on the Commerce team," can you be more specific?

A. The people that I mentioned before.

Q. Okay. So you --

A. Willie Gaynor.

Q. You would have talked to Mr. Gaynor and Mr. -- is it Rokeath?

A. Rokeach.

Q. Rokeach, and Mr. Washburn about --

A. I'm not sure about Washburn. Washburn wasn't there on a daily basis. Willie Gaynor was there on a daily basis.

Q. Who else, other than Mr. Gaynor and Mr. Rokeach, would you have talked to about that issue?

A. I'm not -- those -- those are people I'm

sure I would have talked to about it. Those are people that I would have talked to about it for sure. I don't recall -- you know, remember we're sitting at a desk, a desk about this size, and it's open air. So people are coming, dropping by, saying things to us, you know. There were people that I didn't know who were, you know, commenting on things related to Commerce issues. So I -- I definitely remember that I would have discussed it with Willie and with Rokeach.

Q. Are there other people who you think you -- you may have talked to about this issue during the transition, but you can't be certain?

A. You know, I -- I talk to people all the time in my job. Remember, this is all volunteer activity. The -- you know, I have a day job. So I wasn't -- and I would run into people at the transition all the time, in the lobby, people that I had known for -- from previous campaigns, people that I had known from agencies and so forth. So, again, the -- for me to try to remember everyone I talked to about this, it -- it would be pretty hard for me.

Q. And I understand that. My question is a little bit different. You said that --

A. Do you have people in mind?

Q. Well, I -- I -- I can ask you about some

specific people, but I don't know everybody who was either. You -- you said that the people who you know that you talked to for sure about it were Mr. Gaynor and Mr. Rokeach, and I'm wondering if there are some people who fall into the category of maybe I talked to them about this, or I'm not -- but I'm not sure. I'm sure there are people who fall into the category of, no, I would not have talked to this person about it.

A. Yeah, that's --

Q. Who -- who is in the middle category?

A. Well, I would know better who are people I didn't talk to.

Q. Okay.

A. If you have some people you want to ask about.

Q. I do, but first -- first I want to know if there's -- if there are folks that you have in mind as people that you may have talked to about this, but you can't be sure?

A. If they were -- if they were on the Commerce transition team, I probably talked to them about it.

Q. Okay. Is there a list of individuals who are on the Commerce transition team somewhere?

MR. ROSENBERG: Objection, vague.

MR. FELDMAN: You can go ahead and answer if

you know.

A. I don't have -- I -- I never really sort of knew the total number of people who were on the Commerce transition. Because, again, there were people who showed up at meetings, and I didn't see very much, and there were other people that -- the core group of people, when we were writing a Commerce agency action plan, sitting around the table, David Bohigian, Willie Gaynor, David Rokeach.

Q. (By Mr. Duraiswamy) Anyone else that you remember on the Commerce team, other than those three?

A. Loretta Green was sort of the -- you know, like coordinating -- coordinating appointments for Ray, you know, arranging when Ray would show up. Again, that -- that was really the core group of people on the agency action plan. And I wasn't always there. So like, you know, there -- there was a lot of time that I wasn't even in town.

Q. Who is Tom Hoffler?

A. Tom Hoffler was a person who was known in the redistricting community. He passed away in -- in August.

Q. Was he a member of the transition?

A. No, he was not.

Q. What was the context in which you talked to

him about the citizenship question during the transition?

A. He would have told me what views of members of Congress would have been on this issue.

Q. Did he reach out to you to have that conversation, or did you reach out to him?

A. I can't remember which it was, but, you know, I've known him for 25 years.

Q. How do you know him?

A. I knew him when he was working at the NRCC, and I knew him when he was working at the Department of Agriculture.

Q. Could you spell his last name for me?

A. It's H-O-F-F-L-E-R, I think. Thomas Hoffler.

Q. How many times did you talk to him about the citizenship question during the transition?

A. I don't know how many times.

Q. More than five? Less than five?

A. It certainly would be less than ten. It would -- probably less than five during the transition.

Q. Why were you talking to him about the views of members of Congress regarding the citizenship question?

A. The goal of the transition is not to sort of say, "This is what you should do. This is what you shouldn't do." The goal of the -- one of the most important things that Willie Gaynor and others wanted us to do is reach out to people who would be pushing different things related to Commerce and make sure that we had an understanding if someone was going to introduce legislation on NOAA, that we would have a forecast of likely proposals, likely interests, likely budgetary issues, likely priorities. So the incoming team would have a good sense of what Congress is likely to do.

Q. So if I understand you correctly, one of the things you were trying to accomplish on a transition is understand the views of members of Congress with regard to certain policy issues that were relevant to the Commerce Department and what the --

A. Correct.

Q. -- incoming team would have to deal with at the Commerce Department, correct?

A. So on NOAA, we would be interested. Well, people from Alaska are very interested in fisheries. The Magnuson Act. People from other states with installations are interested in the NOAA satellites, that this delegation is interested in the technology

issues or the intellectual property issues related to PTO, that there are budgetary issues that the Oversight Committee or the Appropriations Committee thinks that the Census Bureau is costing too much, or spending too much money. You'd want to have all of that, that forecast in there, and not prejudge what -- whether Congress was right or wrong about the issue.

But Congress is likely to introduce legislation affecting international -- affecting NAFTA and dispute resolutions. So you would want to have a forecast so you could give them a sense of what -- what issues they're going to face coming into the door.

Q. So you were speaking with Mr. Hoffler to understand the views of Congress with respect to a potential citizenship question on the decennial, because that was an issue that you anticipated the incoming Commerce team was going to be dealing with?

A. They needed to understand that this was one of the issues that people would raise with him.

Q. Who is the "they"? When you say, "they needed to understand that this was one of the issues" --

A. The incoming Commerce team needed to understand all the potential issues that would be

raised by members of Congress, especially those in oversight roles or committee chairmen. And so this was one of many, many issues that were identified.

Q. So you were speaking with Mr. Hoffler to -- to understand and identify issues related to the Commerce Department that members of Congress would likely be interested in; is that correct?

A. I was trying to make sure that if the new Commerce team were going on the Hill and meeting with people on the census, that they would understand issues that would be raised to them.

Q. And specifically the conversations with Mr. Hoffler were to understand what members of Congress might say or think about possibly adding a citizenship question to the 2020 decennial?

A. No, that would have been one --

MR. ROSENBERG: Objection, form.

Q. (By Mr. Duraiswamy) I'm sorry, go ahead.

A. That would have been one of the issues. Remember, Tom Hoffler is also pretty important, because in the past Tom Hoffler was able to get members of Congress to support funding for the Bureau. Because he would say, we need to take a good census. Because, remember, people generally don't want to spend money on the census until we get on top of 2020.

Q. And you said Mr. Hoffler was a redistricting expert; is that right?

A. He was a point person on redistricting, yeah.

Q. A point person in what context?

A. He would talk to members of Congress about redistricting.

Q. From his perch at the NRCC?

A. He wasn't -- I'm not sure he was at the NRCC at the time. I'm not sure he was a -- he was certainly a person that was connected to that issue.

Q. Do you know when he was at the NRCC?

A. I would imagine that he was a consultant or something. Again, I don't know his status, but I know that he was connected to that.

Q. What other issues did you talk to Mr. Hoffler about during the transition, other than the citizenship question, redistricting issues and funding issues?

A. About the -- about the challenges that the census would face in 2020. Because again, we were going to the Internet to the online response. We were going to -- we're adopting new technology. And, you know, when I talk to people, stakeholders, I'm talking always about the challenges that we'll face in the

next census that we didn't face in the last one.

And those really have to do with the work force. They have to do with the technology that sometimes is successful, sometimes is unsuccessful. And what -- it's really important for the census to have a broad -- a broad range of stakeholders that all have skin in the game, that all feel like they're united around the idea of, you know, we may have political differences, but we all want to take a good census.

Q. What do you recall learning from Mr. Hoffler about the views of members of Congress regarding a potential citizenship question on the 2020 decennial?

A. Pretty much what I just explained to you.

Q. Maybe I didn't understand. I'm trying to understand what were the views that members of Congress held that he conveyed to you?

MR. ROSENBERG: Objection. It call -- form. It calls for speculation.

Q. (By Mr. Duraiswamy) You -- you can answer. They will object from time to time. Unless they tell you not to answer, you can answer.

MR. FELDMAN: The only comment I would have, if you know in the conversations that he specifically represented something from his knowledge of Congress'

view.

A. I -- I -- I don't recall specifics, but I know, in general, Tom always believed, and I share his view on this, block level data, accurate block level data is very important.

Q. (By Mr. Duraiswamy) For redistricting purposes?

A. For everything. For everything.

Q. Including redistricting purposes?

A. Including redistricting purposes.

Q. Block level data for what?

A. For everything. For all census data, and that basically if you -- the hardest thing about the census is not counting everyone living in America. It's counting everyone living in America at the right address one time.

Q. And he conveyed that view to you in your conversations with him during the transition?

MR. ROSENBERG: Objection, vague, form.

A. Yeah, again --

Q. (By Mr. Duraiswamy) Let me try to --

A. I gave you a broad thing of -- of something that Tom was always concerned with in every conversation that I would have with him.

Q. I'm just trying to understand. You said you

talked to him about the views of members of Congress related to the citizenship question.

A. I -- so I would start --

Q. That's my understanding.

A. I would start out the conversation by saying what are members of Congress likely to raise on the census issue that we can incorporate into the transition planning so the new Commerce team is not blindsided.

Q. And then he raised the issue of a citizenship question or an immigration --

A. That was one of -- that was one of the questions.

Q. Okay. Did he --

A. And I'm sure that we talked about census residency rules as well.

Q. Can you -- just for people who may not understand what census residency rules means, can you explain what that means?

A. It basically means where were you on April 1st. So people move around, they're snowbirds, they're living at colleges, they're incarcerated or otherwise detained. They're in group houses. There's overseas military. Census residency rules say -- are designed to ensure that people are -- are counted at

the right address.

Q. I assume you talked about census residency rules for undocumented immigrants?

A. No, not that I recall.

Q. It's possible, but you just don't recall one way or the other?

A. I don't recall that. It's generally not something associated -- residency rules generally don't get associated with that issue, unless you're dealing with migrant farm workers who tend to be documented.

Q. Well, you know there's litigation going on about that right now, right?

A. Not -- I don't.

MR. ROSENBERG: Objection.

A. I don't.

Q. (By Mr. Duraiswamy) Okay. That's fair. I'm sorry.

(The court reporter motioned to the attorney.)

MR. DURAISWAMY: I will do my best, but I will caution you that may not be the last time you have to remind me.

COURT REPORTER: Thanks.

Q. (By Mr. Duraiswamy) And the census residency

Then there was October. Not a lot happened. Then November, a lot of activity. Then December, a lot of activity. Now a lot of activity.

So it's -- and, again, this is a part-time volunteer job, so it's very difficult for me to kind of try to recall exactly who said what when.

Q. Well -- well, do you recall discussing with other individuals on the Commerce team whether there were particular people or constituencies who are interested in adding a citizenship question to the census?

MR. ROSENBERG: Objection, vague.

MR. FELDMAN: If you -- if you can answer it, answer it.

A. Tom Hoffler was, I think, the first person that said something to me about that issue.

Q. (By Mr. Duraiswamy) Meaning he -- he --

A. He flagged it, you know. He said --

Q. He flagged it as something that might be of interest to some people --

A. Right.

Q. -- in constituencies?

A. Right.

Q. And you said he was a point person for redistricting in certain circles. He's -- he's a

Republican -- he was a Republican?

A. Yeah, he is.

Q. Okay.

A. Yeah.

Q. And so his work on redistricting over the years has been in connection with the Republican party or different state Republican parties, if you know?

A. Well, he was --

MR. ROSENBERG: Objection, vague, lack of foundation.

MR. FELDMAN: Go ahead.

A. He was the person I recall in the 2000 census who was advising Bill Thomas, who was the Chairman of the House Administration Committee, and Bill Thomas was an expert, you know, as -- he was an expert on a lot of things, but he was an expert on redistricting. So I knew that Tom Hoffler had the ear of committee chairmen who would interact with a Secretary of Commerce.

Q. (By Mr. Duraiswamy) Did he -- do you recall him referring to specific members of Congress who might be interested in that issue?

A. I don't recall --

MR. ROSENBERG: Objection, vague --

A. -- the specific ones.

MR. ROSENBERG: -- as to who the him was.
MR. DURAISWAMY: Okay.
MR. FELDMAN: He answered it.
MR. DURAISWAMY: That's fine. I'd ask, though, that you just object to the form.
MR. ROSENBERG: (Nodding head.)
Q. (By Mr. Duraiswamy) What was the substance of the conversations that you had with the other members of the Commerce team regarding a citizenship question during the transition?
A. Again, one of many issues.
Q. I understand it's one of many issues. I'm just trying to understand what was discussed about it.
MR. FELDMAN: When?
MR. DURAISWAMY: During the transition.
MR. FELDMAN: That's from a period of when to when? Why don't we put --
A. From September through -- through January.
Q. (By Mr. Duraiswamy) When did you join the transition?
A. Probably September was the first time I went there.
Q. Okay. And I assume we can agree that the transition ended at the time that President Trump, now President Trump, took office as --

A. Right.
Q. -- the president, correct?
A. Right.
Q. Okay.
A. So, again, the November, December, January is a whirlwind of activity. I'm volunteering. This is my spare time that I'm doing it, and it's not like I'm there 8:00 to 5:00 five days a week. I'm there when I can be there. And so, again, very difficult for me to try to recall who said what to whom.
Q. Okay. Let me try to be more specific. Did you all talk about the potential uses of a citizenship question on the census?
A. Uses?
Q. Of how the citizenship -- of how -- strike that.

By uses, I mean how the data gathered from asking the citizenship question could be used?
A. Well, my understanding would be that the use would be having block level citizen voting age population data.
Q. And that was the understanding that you had at the time?
A. That was what I was told was the principal objective.

Q. By who?
A. By Tom Hoffler.
Q. For what purpose?
A. Taxes.
Q. What would be the value of having block level --
A. Citizen age voting -- to ensure one person, one vote.
Q. Can you explain, how -- how does having block level citizenship voting age population data ensure one person, one vote?
A. This is going to be a long explanation.
Q. That's fine.
A. Have you -- have you read through my presentation on this?
Q. Yes.
A. You know which one it is?
Q. I think so.
A. You said to a federal judge that I -- that there was no record of what I talked about with the Secretary. And yet you're saying that you read my presentation to the Secretary, but you told a federal judge that I didn't --
MR. FELDMAN: Just answer the question.
Q. (By Mr. Duraiswamy) I think he produced it

in response to the subpoena we served after the federal judge ordered the deposition.

A. No, actually it was in -- it was in the documents before.

MR. FELDMAN: Mark, answer -- answer his question.

Q. (By Mr. Duraiswamy) In any event, can you explain what Mr. Hoffler said to you about why --

A. No. Wait. No. You wanted me to explain why I think that block level data is important to citizen voting age population, or do you want it explained why Tom Hoffler does?

Q. I'm trying to understand the conversations you had during the transition. So you said --

A. He said that after the long-form data went away in 2000, that the quality of block level citizen voting age population had now diminished. So the -- so the ability to draw a district which would elect a Latino in a population where there were non-citizens was very, very difficult.

Q. He said that to you during the transition?

A. He -- we would have talked about it. I'm not sure whether it was in the transition or after the transition, but we would have talked about that issue.

Q. I'm trying to focus on in the transition

right now. So you're not sure if you had that conversation with him about that potential use of citizenship data during the transition; is that right?

A. I'm not sure that I did.

Q. Okay. So I'm trying to understand, you discussed potential uses of citizenship data gathered from the decennial with others on the Commerce team or Mr. Hoffler during the transition?

A. I would think so.

Q. Okay. And --

A. I -- I don't recall, but I would think so.

Q. Do you recall discussing the possibility that it could be used for immigration enforcement purposes?

A. Oh, I -- I would never -- first of all, I would -- that would be illegal, number one. Number two, anyone that would suggest that or broach that to me, I would immediately be totally opposed to that.

Q. I understand your view about that. Did someone, in fact, suggest or broach that to you during the transition?

A. No, no.

Q. Okay. I'm just -- I'm not asking for your views, and I'm not even asking if you advocated for it. I'm just trying to understand, did you have any

conversations with anyone where the possibility, good or bad, of using --

A. Definitely -- definitely not.

Q. Let me just finish the question --

MR. FELDMAN: Let him finish the question.

Q. (By Mr. Duraiswamy) -- so the record's clear -- of using citizenship data from the decennial for immigration enforcement purposes came up?

A. No.

Q. Okay. Did you discuss, during the transition, potential use of citizenship data from the decennial for reapportionment purposes?

A. Citizenship, no.

Q. Did you discuss, during the transition, with anyone, whether undocumented immigrants or non-citizens should be included in the state population counts for reapportionment purposes? That issue, generally. I'm not asking you about a position you took, but did that issue come up in your conversations?

A. Not -- not to my --

MR. ROSENBERG: Objection, form.

A. Not to my recollection, no.

Q. (By Mr. Duraiswamy) Did the issue of how states might use citizenship data from the decennial

census in deciding how to draw legislative districts come up in your conversations with Mr. Hoffler?

A. I don't believe so. Again, you know, when you -- these are conversations long ago, but it -- it -- I don't think so. Because it -- again, it's not the kind of thing that he would talk about.

Q. Did it come up in your discussions with anyone else during --

A. No.

Q. -- the transition? Are you aware of anyone else involved with the transition or the Trump campaign or the incoming Trump administration discussing that issue during the transition?

A. I -- not personally, but I've heard that from reporters and other people.

Q. Okay. What have you heard from reporters and other people?

A. That those people -- that there were people discussing it. And I said, "Well, if they were, they weren't discussing it with me."

Q. Who have you heard was discussing that issue during the transition?

MR. ROSENBERG: Objection, vague.

A. Again, I don't have personal knowledge of -- because I didn't -- no one discussed it with me.

name. So that was the one I was focused on.

Q. I think I understand what you're saying. You're saying the -- Steve Bannon's name, in connection with this, came up recently for you in the context of reviewing our subpoena. You're not sure if it came up in the context of the other rumors --

A. Right.

Q. -- that you heard about this issue?

A. Right.

MR. ROSENBERG: Objection, vague and form.

Q. (By Mr. Duraiswamy) And sitting here today, you can't remember any other individual names or organizational names that came up in these rumors that you heard recently?

MR. ROSENBERG: The same objection.

Q. (By Mr. Duraiswamy) Is that right?

A. That's -- yeah, that's correct.

Q. Okay. In your discussions with Mr. Hoffler and folks on the Commerce team during the transition, did you discuss how -- the potential process for adding a citizenship question to the decennial census?

A. I'm not sure whether I would have -- that probably would have come -- yeah, that probably would have been something that we discussed.

Q. What kinds of discussions about that did you

have?

A. How -- I'm trying to remember here. I'm trying to remember whether the issue of adding a question about sexual orientation on the ACS was something that came up before or after the issue of citizenship. That's what I can't remember in my head. Because that would have been sort of --

Q. I'm --

A. -- the last -- that was another issue that was -- came up in the transition, was that advocacy groups for the LGBTQ community wanted to add a question about sexual orientation on the ACS. And that was something that we all -- also would have, I think, discussed during the transition, was that there -- you know, there --

The issue was are you going to add or change questions to the decennial census questionnaire in addition to the citizenship issue. How are you going to, you know, change the relationship questions when you say how was this person related, opposite sex couple; again, I -- this is stuff that I haven't looked at for a long time. So I don't remember whether I was looking at -- at those, at that process issue before or after the citizenship discussions.

Q. But that process issue, you're saying, would

have been relevant to the addition of a citizenship question and potentially other questions; is that -- is that what you're --

A. Yeah. Yeah.

Q. Okay.

A. Because obviously there was a -- there was a -- a request in to -- from DOJ to Census about the sexual orientation question addition. So you know, again, it's -- it's hard for me to remember which comes first, whether I was looking at that in the context of the citizenship, or looking at that in the context of how we're going to -- how the transition is going to approach the sexual orientation issue.

Q. Okay. Other than what we've talked about, did you come to learn during the transition that there was anyone else who was interested in potentially adding a citizenship question to the census?

A. I don't -- I don't -- I don't remember specifically about which other -- I remember Tom Hoffler for certain. It might have come up when I was on Capitol Hill during the transition and meeting people in early January.

Q. With whom do you think it may have come up?

A. I went to see the -- the counting of the electoral count in the -- in the house chamber, so I

would have run into a lot of people there.

Q. And --

A. And some of them would have known Tom. So they would have known that I was working on the Commerce transition. So there would have been members of Congress there. Again, it's one of those things where you go to a ceremony like that and you see a lot of people, and they say, oh, yeah, I hear you're working on the transition.

And I think Willie Gaynor went with me to that, and Willie knows a lot of people, so he would have said, "Oh, yeah, Mark's working on census issues." So, again, that would have been a time that people could have talked to me about it.

Q. And do you recall who might have talked to you about it during that time?

A. No. Because, again, there were lots of people and I -- it blurs in to other things.

Q. Sitting here today, do you have an understanding of whether there are particular members of Congress who are interested in a citizenship question being added to the census in 2020?

A. I haven't followed that. I didn't go to any of the hearings with Secretary Ross when he testified on the census. I didn't go to his confirmation

question for 2020, correct?

A. I'm saying they -- the department will need to -- wait. The question -- the Department of Justice may request. So it's -- it's letting people, the agency team, know they may request something that affects your department.

Q. And you're saying this is a possibility that could happen in the future, correct?

A. Right. You don't know that it will. It's a possibility.

Q. And -- and certainly no one during the transition told you that the Department of Justice was going to do that, correct?

A. I'm not interacting with the DOJ team.

Q. Okay.

A. So unlike -- with Commerce and USTR, we're interacting because we share authorities. DOJ and Commerce aren't sort of sitting down and saying, "Okay. What are you going to do to affect us, and what are we doing to affect you?"

Q. So the possibility that the DOJ would request the addition of the question for 2020, was that something that you learned about from your conversations with Mr. Hoffler?

MR. ROSENBERG: Objection, misleading.

MR. FELDMAN: If you could answer.

A. It would have been something that he discussed, but I could have learned it from other people too.

Q. (By Mr. Duraiswamy) Do you remember learning it from anyone else?

A. I don't recall. Again, understand that we're sitting in an open floor plan, and people are coming to us, you know, a lot of people I didn't know saying, "Oh, well, you know, what about this on export controls? What about this on trade?" And impromptu meetings back and forth, a lot of -- lot of cooks in the kitchen.

Q. So you don't recall specifically anyone else raising this issue, but this is an issue that likely would have been raised in the discussions with Mr. Hoffler, correct?

MR. ROSENBERG: Objection. It calls for speculation.

A. Again, I -- there could have been people that talked about it, but I don't recall those conversations.

MR. DURAISWAMY: Brad, can I ask you to just limit your objections to the form, please?

MR. ROSENBERG: I think that is a form

MR. FELDMAN: And by "this," he's referencing Exhibit 2.

A. Exhibit 2, yeah. May I point out something about --

MR. FELDMAN: No.

THE WITNESS: Okay.

Q. (By Mr. Duraiswamy) Is there something that you would like to point out about the memo?

MR. FELDMAN: Now you can point it out.

A. On Page 7 you say -- it says, "The director of the U.S. Census Bureau shall include questions to determine U.S. citizenship and immigration status on the long-form questionnaire in the decennial census." This is clearly written by someone who isn't talking to anyone who knows something about the census, because there is no long form. It was eliminated in 2000.

Q. (By Mr. Duraiswamy) You testified earlier that Mr. Hoffler had indicated to you that after the ACS census CEDCaP data was no longer available at the block level; is that right?

A. Correct.

Q. Did he suggest to you that prior to the ACS, while the long-form questionnaire was in effect, that citizenship data was available at the block level?

A. That was the whole point of a one in six household sample, is one in six gives you block level data confidence that one in forty-three does not give you.

Q. Are you confident of that, that during the period in which --

A. That's my understanding.

Q. Okay.

MR. ROSENBERG: Objection, form.

Q. (By Mr. Duraiswamy) Just to clean that up. It's your understanding that while the long-form questionnaire was in place, citizenship data was available at the census block level and not just at the census block group level?

A. That's my understanding.

Q. And is that based -- that understanding based on your conversations with Mr. Hoffler or anything else?

A. No, it's based on my experience with the census as chairman of the monitoring board, as member of the executive staff and as a chairman of the 2010 Advisory Committee.

Q. Okay. So we've talked about the transition. I want to now talk about the post-transition period. Can you identify everyone at the Department of Justice

with whom you have communicated about the possible addition of a citizenship or immigration question to the 2020 census?

A. That would be one person, John Gore.

Q. Have you spoken to anyone at the Department of Justice about the inclusion of noncitizens or undocumented immigrants in the population count for reapportionment?

A. No.

Q. Have you spoken to anyone at the Department of Justice about the inclusion of non-citizens or undocumented immigrants in the population count for state level redistricting?

A. No. See, we're talking about people --

MR. FELDMAN: Just answer his questions.

A. I'm -- I'm assuming you're asking me about people other than John Gore when you say "talked to people at the Department of Justice." Because John Gore in the only person at the Justice Department I've ever talked to.

Q. (By Mr. Duraiswamy) No, I appreciate that clarification, and I encourage you to let him clarify his testimony, because I --

MR. FELDMAN: That's -- well, I -- why don't you ask -- you had said, and I think he recognized --

count everyone, and you can't subtract anyone from the count.

Q. Do you have an understanding of whether there are -- well, strike that.

When was your conversation with John Gore about a citizenship question?

A. It would have been after the summer, but well before the winter.

MR. FELDMAN: The summer of what year? '17?

A. 2017.

Q. (By Mr. Duraiswamy) How many conversations about that issue did you have with him?

A. We -- we met one time.

Q. Where did you meet?

A. At a -- not at the -- not at a government building. We met for coffee near -- near -- probably we met like in the cafe around the -- around his office.

Q. Could it have been in October of 2017?

A. Yeah, it could have been.

Q. Was anyone else present?

A. No one else was present.

Q. How did that meeting come about?

MR. ROSENBERG: I'm going to object. I just want to caution the witness that there's potential

that that question calls for information that's protected by the deliberative process privilege. And the Government would instruct the witness not to answer any questions that would reveal the substance of a conversation between the witness and Mr. Gore. I think that the witness can answer that question in general terms, so long as he does not reveal substantive information that was deliberative and that was shared with Mr. Gore.

MR. FELDMAN: I'm trying to get this down. I believe the question was how did the meeting come about? Have I said that correctly?

MR. DURAISWAMY: Yes.

MR. ROSENBERG: But just to be clear, the basis for the objection, I mean, there could be a basis by which the meeting came about that would not reveal deliberative information, but there could also be, you know, somebody asking a question that would reveal substantive information. So, you know, it's possible that the witness might be able to answer the question, but I would instruct him not to provide deliberative information that would reveal the substance of the conversation.

MR. DURAISWAMY: Well, let me withdraw the question for a second and ask it a little different.

Q. (By Mr. Duraiswamy) Were you ever asked to serve as a formal or informal adviser to the Department of Justice?

A. No.

Q. How did the meeting with John Gore in the fall of 2017 come about?

MR. ROSENBERG: The same objection.

MR. FELDMAN: Go ahead, answer.

A. James Undermeier [sic] asked me to -- to meet with him. I think that's his name. I -- I may be getting the -- Commerce official.

Q. (By Mr. Duraiswamy) Is -- does James Uthmeier --

A. Yeah.

Q. -- or Uthmeier sound correct?

A. Something --

Q. And apologies to James for mispronouncing his name. When did he ask you to have that meeting? Was it shortly before the meeting took place?

A. Within a few weeks before the meeting took place.

Q. Did you have an understanding as to who -- whose idea it was to have that meeting, whether it was --

A. I wouldn't have known who John Gore was.

Q. Let me --

MR. FELDMAN: You -- you -- you answered the question before counsel -- counsel finished his question. Let him finish it.

MR. DURAISWAMY: In fairness, it wasn't a great question, so let me try to ask it in a better way.

Q. (By Mr. Duraiswamy) Was it your understanding that it was someone at the Commerce Department who had the idea for you and Mr. Gore to meet?

A. I think so.

Q. Okay. Not someone at the Department of Justice?

A. Not someone at the Department of Justice.

Q. Do you know who -- who originally had the idea for you and Mr. Gore to meet?

A. No. And originally is the -- you know, again --

Q. Obviously, Mr. Uthmeier reached out to you --

A. Yeah.

Q. -- and that's what I'm asking, if you know who originally had the idea. How long was your meeting with Mr. Gore?

A. I don't know.
Q. I'm just looking for an approximation. More than an hour?
A. I doubt it was more than an hour.
Q. More than 30 minutes?
A. Probably.
Q. Okay. So roughly somewhere between 30 and 60 minutes?
A. I think so.
Q. You're aware that there was a letter sent by the Department of Justice to the Commerce Department in December 2017 regarding the addition of a citizenship question to the census?
A. Yes.
Q. Did you have any involvement in the drafting of that letter?
MR. ROSENBERG: Objection, form.
MR. FELDMAN: If you know.
A. Well, it -- again, I wasn't part of the drafting process of the letter, but I'm sure that in our -- I -- when I met with John Gore, I wanted to show him what the Census Bureau said about why they ask the ACS question. Because, again --
MR. ROSENBERG: And I'm -- again, I'm going to object and instruct the witness not to answer the

MS. BRANNON: Okay.

MR. ROSENBERG: -- of course, in the Government be as -- as nimble as possible in meeting and conferring and responding, and I imagine that we could do so tomorrow.

MS. BRANNON: Okay. No, that makes sense. So we will agree to that. There has -- and just to be clear, the reason, there has been some meet and confer -- meet and confer on related topics to this, and a motion was filed today in the NYIC case. And so I am just not familiar enough, and would want to confer with my colleagues as to whether or not the nature of the discussions that have come up at the deposition today fall within that issue or whether it is a new and separate issue. We will certainly try to meet and confer about that part with you as quickly as possible before we would move forward without revealing anything publicly.

MR. ROSENBERG: Thank you.

Q. (By Mr. Duraiswamy) Okay. Sorry for the interlude. So at that meeting you provided some information to Mr. Gore for purposes of the letter that DOJ subsequently drafted regarding the citizenship question?

A. Mainly the -- mainly a copy of the -- of the

letter from the Obama Administration, Justice Department, to the Census Bureau on the issue of adding a question on the ACS. Right.

Q. There -- there were -- in the documents that you produced, there were two such letters, I believe, one from 2014 and one from 2016. Does that sound correct to you?

A. Yeah.

Q. And you provided both of those?

A. Just -- I think probably just the 2016 one.

Q. Okay. And the purpose of that was to show --

A. Modalities.

Q. Well, strike --

MR. ROSENBERG: And I'm going to interpose an objection and again instruction to not answer again on deliberative process privilege grounds.

Q. (By Mr. Duraiswamy) Well -- well, let me strike that and ask a -- a different question.

That document, if I'm recalling correctly, has a chart of different demographic questions that are asked on the ACS and an explanation of the governmental uses of those questions; is that correct?

A. Yes.

Q. Okay. And you were providing that to

Mr. Gore in order to explain the potential use of a citizenship question on the decennial census as well?

MR. ROSENBERG: The same -- the same objection and instruction not to answer on deliberative process privilege grounds.

MR. FELDMAN: Go ahead.

A. I wanted the -- John Gore, who was a non-career person, to understand the modalities and accepted process of the interaction between DOJ and Census on census issues.

Q. (By Mr. Duraiswamy) What was it about that that you wanted him to understand?

MR. ROSENBERG: The same objection and instruction not to answer on deliberative process privilege grounds.

MR. FELDMAN: Go ahead.

A. I wanted him to understand what had -- the previous interactions on additions of questions.

Q. (By Mr. Duraiswamy) What about those interactions did you want him to understand?

MR. ROSENBERG: The same objection and instruction not to answer on deliberative process privilege grounds.

MR. FELDMAN: Go ahead.

A. How that -- the normal procedures. Who at

DOJ, when you're talking about census issues, talks to Census and who they talk to.

Q. (By Mr. Duraiswamy) And the fact that in adding questions to the ACS or the decennial census questionnaire, the requests come from outside of the Commerce Department to the Commerce Department where there is a need for some other agency; is that correct?

MR. ROSENBERG: Objection. The same objection and instruction not to answer on deliberative process privilege grounds and also an objection to form.

MR. FELDMAN: Go ahead and answer if you understand the question.

A. I communicated that requests for data to the Census from the administration come from agencies.

Q. (By Mr. Duraiswamy) You agree that the census doesn't typically -- well, strike that.

Did he provide you any information at that meeting?

MR. ROSENBERG: Same objection and instruction not to answer on deliberative process --

A. I don't know.

MR. ROSENBERG: -- privilege grounds, unless the witness can answer that with a yes or no.

A. No.
Q. James Sherk?
A. No.
Q. Have you spoken with Mr. Hoffler about this issue since the transition?
A. Tom was very sick, very sick. And, in fact, I didn't know that he passed away. So Tom was really kind of out of the picture. And I also want to say, Tom was not an -- did not appear to me to be an adviser to the -- to the administration at all.
Q. A separate question.
A. Yeah.
Q. And I'm not -- I didn't necessarily mean to connect it.
A. So I don't kind of see him as an intermediary for the administration.
Q. No, I'm asking about Mr. Hoffler separately. Did you -- I'm not sure that I got a clear answer to the question. Did you have any communications with him about a potential citizenship question since the transition?
A. Tom Hoffler?
Q. Yes.
A. Oh, yes. Yes.
Q. How many times, roughly?

A. It would be more than a couple, but it wouldn't be more than a dozen. And remember, we're talking about from January through -- through whenever I last talked to him, which would have been maybe -- I'm not even sure I talked to him in 2017.

MR. FELDMAN: 2017 or 2000 --

A. Or 2000 -- I'm not sure I talked to him since even May of this year.

Q. (By Mr. Duraiswamy) And he -- what were the -- what was the substance of those conversations?

A. Well, Tom and I are good friends, so I don't know -- you know, I've known him for 30 years. We talked a lot about his cancer treatment. We talked a lot about what he was going through. We talked a lot about prayer. So, you know, there would be conversations about what was going on in politics that would bleed into our personal conversations.

Q. And some of that was about the potential citizenship question on the 2020 census?

A. It seemed like -- like it wasn't a topic in the last -- in the last -- certainly the last six months. Again, hard for me to remember about -- again, with someone like Tom that I'm a -- a good friend of a long time, and with someone that I check in with about their health, and there are not a lot of

people like that, so I don't -- I don't recall how many times.

Q. Well, my question is -- well, I think you mentioned before that you did have those conversations since January 2017, but my question is just what was the substance of your conversation about this issue, about the citizenship question?

A. Well, he talked about how block level data was -- and, again, block level data is an obsession with him, because block level data means that you can draw the most accurate districts. And so, again, his focus was always on block level data, and always on, "Mark, you need to make sure that we take a good census, that the administration doesn't skimp on the budget," because a good census is good for what he does.

Q. And he was the person that you principally relied on for your understanding regarding the need for block level citizenship data; is that right?

A. He was the one of the people that I -- actually, Tom -- in talking to Tom, I knew that it was going to be an issue that the department would confront, because I knew Tom had the ability to get members of Congress, who were important to the administration, to pay attention to the issue. You

know, that's what -- again, in the transition, your job is to forecast what's going to come across the transom for the new administration.

Q. Did you speak with anyone else in Congress or affiliated with a member of Congress about the citizenship question since January of 2017?

A. I talked to -- you know, I talk to my own member of Congress, Rodney Davis, all the time. You know, I see him at things. I talk to people in the Illinois delegation that I see at the University of Illinois. I -- again, to say did I talk to someone in Congress, I talk to people in Congress who I've known for a long time. I went to school with Peter Roskam. I -- I talk about lots of things with them.

Q. Sure.

A. Did I go and do a presentation in anyone's office about this, no.

Q. I was wondering if you talked to any of them about this issue?

A. I'm sure that I talked to members of Congress, including Democratic members of Congress about this issue.

Q. And what do you recall them communicating to you about it?

A. I recall Congressman Lacy Clay being upset

that this question was going to be answered. But at the same time, he was very concerned about getting the administration to focus on getting a good count, and he asked for my help in that.

Q. What else do you recall about --

A. I recall that we --

Q. -- those conversations?

A. I talked to a Congresswoman from New York, Carolyn Maloney --

Q. Uh-huh.

A. -- who has, you know, long time involvement with census issues. And she was telling me how important it is to get Secretary Ross to focus on how important the census would be and that to request full funding and so forth. So, again, you have these conversations that are taking place. People see me and they say, "There's the census guy." You know, "Let's talk to him about it." So I don't want to leave anything out, but I talk to members of Congress all the time.

Q. I understand that. But I -- we sort of drifted into issues unrelated to the citizenship question. So I'm trying to help you by narrowing it to that -- to that issue.

A. Again, I -- there's interaction all the time

and I don't want to leave anything out.

Q. And I'm just asking you to please tell us what you remember about the conversations that you had with members of Congress, or people affiliated with members of Congress, regarding a citizenship question since January 2017 --

A. Again, I --

Q. -- other than the discussion with Congressman Clay that you just mentioned.

A. I -- I don't have a log. I don't -- I -- I talk to people all the time. I run into them in airports. I run into them at events. We talk about things. And for me to say -- to recall among those hundreds, thousands of conversations that I have, I know what I generally want to talk about with members of Congress about the census, which is we need to take a good census. We need to focus on the differential undercount. We need to focus on all these issues that I've been involved with for the last 30 years. But again, it's -- this is not my job, so I don't, you know, keep logs of all the -- who I talk to when and so forth.

MR. DURAISWAMY: Okay. Move to strike as non-responsive.

Q. (By Mr. Duraiswamy) Has anyone ever

suggested to you that block level citizenship data -- strike that.

Has anyone ever suggested to you that having access to block level citizenship data would be helpful to Republican efforts in redistricting?

A. I'm sure someone has said that.

Q. Tom, presumably?

A. What he said is that it will help draw maps, which will be acceptable as the maps that best provide minority representation, and so therefore are not challenged. So the frustration is you keep drawing a district, and because you don't have block level data, someone says, well, you didn't draw a map that maximized -- I use the word "maximized," Latino representation based on their numbers. And when you don't have that block level citizenship data, what you're doing is you're cheating the Latino community out of representation at all levels of government.

Q. That was the -- that was something that he suggested to you?

A. No, it was -- it was a conversation that we had. My point about maximization is my word. I want Latino representation to be maximized.

Q. Have you done any research on the Voting Rights Act?

A. I'm not an expert on the Voting Rights Act.
Q. Have you done any research on the Voting Rights Act?
A. I'm not an expert on it. I -- I read about the Voting Rights Act, yeah.
Q. Do you have any expertise on the legal standard for Section 2 of the Voting Rights Act?
A. I'm not an expert on it.
Q. Have you relied on others for expertise on the Voting Rights Act in Section 2 in particular?
A. Yes. So I -- you know, when I -- when I study things, I look to people who are experts.
Q. Okay. And who -- who have you looked to for expertise on those issues?
A. Off the top of my head, I'd have to go back. I'd have to go back and look at it. But I did -- I -- one of the things that I was most interested in is there was an amicus brief that was filed by five census directors. And those -- in a nutshell, what those census directors said is block level data is the most important thing in end product in terms of ensure -- ensuring accurate representation, and you can only get block level data from the census. I didn't look at that until -- you know, until 2018.
Q. Was Mr. Hoffler one of the people you relied

on for expertise about the Voting Rights Act --

A. I -- you --

Q. I'm asking you. Sorry.

A. Oh, okay.

Q. Was he one of the people?

A. No.

Q. Who -- who were the people? You said off the -- you'd have to go back and check, but --

A. I'd have to -- I'd have to -- I don't recall.

Q. You -- you can't remember anyone that you've relied on --

A. I can recall looking at the cases --

Q. -- for expertise on that issue?

A. -- and looking at what Justices of the Supreme Court said about it and looking at that.

Q. Okay. Let's go back to if you recall communicating with anyone else direct -- in the Trump administration directly or indirectly about the citizenship question, other than the people we've already identified.

MR. FELDMAN: I'm not sure I understand. Are you talking about was there anybody else other than the people that have been discussed?

MR. DURAISWAMY: Yes.

A. I don't remember the person's name. I seem to remember he had a Bush connection, like law school or something like that.

Q. Any other candidates that you can recall?

A. Brunell was the main one that I recall.

Q. Anyone else from the redistricting world that you recall being considered?

A. Not that I recall, no.

[Marked Exhibit No. 17.]

Q. Handing you what we've marked as Exhibit 17. Did we mark it as Exhibit 17? Yes. Sorry. Do you see this is an e-mail exchange between Secretary Ross and Peter Davidson from October 8th, 2017?

A. Uh-huh.

Q. Was the --

A. Yes.

Q. For the record, can you identify the subject of the e-mail exchange?

A. Subject is, "Letter from DOJ."

Q. Okay. And the first e-mail is from Secretary Ross to Mr. Davidson --

A. Uh-huh.

Q. -- asking what is its status. Do you see that?

A. Yes.

Q. And Mr. Davidson responds that he is on the phone with you, and you're giving him a readout of a meeting last week, correct?

A. I see that.

Q. Was that your meeting with John Gore?

MR. ROSENBERG: Objection, assumes facts not in evidence. It calls for speculation.

A. I don't know whether it's -- it would make sense, but I don't know.

Q. (By Mr. Duraiswamy) Did you have a meeting with anyone else about a letter from DOJ?

A. That -- that's why I said the -- the timing seems like it's -- dovetails with what you and I were discussing earlier.

Q. Right. Because the meeting with John Gore was about the letter from DOJ regarding the citizenship question, correct?

A. No, the letter -- the meeting with John Gore was about the -- how Census interacts with the Justice Department. Again, this is a communication from two other people, not from me.

MR. ROSENBERG: And just -- just for the record, again, we're going back to the substance of the communications with Mr. Gore, which the Government believes is covered by the deliberative process

privilege, and so I would instruct the witness not to, you know, provide any additional information regarding that meeting.

MR. FELDMAN: And subject to that, he's answered the question, I believe.

Q. (By Mr. Duraiswamy) Well -- well, you had a phone call with Mr. Neuman -- strike that.

You had a phone call with Mr. Davidson around -- on or around October 8th, correct?

A. It -- it says that. I don't know that I did.

Q. Okay.

A. I don't recall that I did.

Q. No reason to believe it didn't happen, correct?

A. I don't recall that it happened.

Q. Okay. No reason to believe that when Mr. Davidson wrote on October 8th in an e-mail, "I'm on the phone with Mark Neuman right now" that he was lying?

A. I don't know the answer to that question.

Q. Okay. You don't know whether he was lying or not when he wrote Secretary Ross on October 8th?

A. I don't know what he did --

MR. ROSENBERG: Objection.

A. -- and what he didn't do. I only know when you ask me things about me.

Q. (By Mr. Duraiswamy) Well, I am asking you things about you. I'm asking you -- I understand you may not specifically remember. I'm just asking you, do you --

A. I said I do not recall.

Q. -- have any reason to believe it didn't happen?

MR. ROSENBERG: Objection, form.

MR. FELDMAN: If you know what -- if -- if you don't have a reason that it didn't happen, say -- tell him.

A. I don't have a reason to know whether it happened or it didn't happen.

Q. (By Mr. Duraiswamy) Just -- just so we're clear on what the e-mail says, Secretary Ross asks Mr. Davidson what is the status of the letter from DOJ, right?

A. That's what this says.

Q. Okay. And Mr. Davidson responds and says that he's on the phone with you and you're giving him a readout of a meeting that you had the previous week, correct?

A. That's what this says.

Q. Okay. And separate from the e-mail, your meeting with John Gore was around this time frame, correct?

A. Yes.

Q. Okay. But you have no recollection of this -- of a phone call with Mr. Davidson around this date?

A. I don't recall that.

Q. Do you recall ever having a phone call with Mr. Davidson where he told you that Secretary Ross wanted an update on the status of a letter from DOJ?

A. I don't recall.

Q. The e-mail seems to indicate that Mr. Davidson wrapped up the call at 10:54 p.m. after emailing Secretary Ross that he was on the phone with you at 6:47 p.m. First of all, do -- do you see what I'm referring to in the e-mail?

A. Yes.

Q. Okay. Have you ever been on the phone with Mr. Davidson for four hours?

MR. ROSENBERG: Objection, misleading.

MR. DURAISWAMY: What is misleading about the --

A. I --

MR. DURAISWAMY: Wait, wait. What's --

MR. ROSENBERG: It may not --
MR. DURAISWAMY: No, no. That -- that's an improper objection.
MR. ROSENBERG: No.
MR. DURAISWAMY: What's misleading about the question?
MR. ROSENBERG: It's -- so we don't know necessarily from these date -- time stamps whether there might be different time zones involved in this e-mail.
MR. DURAISWAMY: Do you -- what was my question?
MR. ROSENBERG: I made my objection.
Q. (By Mr. Duraiswamy) Have you ever been on the phone with Mr. Davidson for four hours?
A. I don't recall.
Q. How long were -- were your typical phone calls with him about census issues?
A. I don't recall how long they would go.
Q. You don't recall anything about how long your phone calls were with him?
A. No.
Q. Do you recall if they were -- it's possible that they were 14 hours in length?
A. I'm sure that I never talked him for 14

hours.

Q. Okay. Do you remember that when we started this deposition, we talked about the fact that if you say that you don't recall something, when, in fact, you do recall it, that that's false testimony? Do you remember that we talked about that --

A. Yes.

Q. -- at the outset? Okay. What do you recall about the length of the phone calls or conversations that you had with Mr. Davidson about the census over the last couple of years?

A. I recall that I had some.

Q. And you have no recollection about how long those calls were or those interactions were?

A. Well, you said -- you asked me if I was -- talked to him for four hours. I don't recall talking to anyone for hour hours in one phone call.

Q. No. I'm asking you now approximately how long were the interactions that you had with him regarding the census. Can you give me a range?

A. I -- I don't know. I don't recall how long they were.

[Marked Exhibit No. 18.]

Q. Handing you what we've marked as Exhibit 18. We've got one copy for you guys. Take a minute to

review this document and let me know if you've seen it before.

A. I have seen it before.

Q. When did you see it?

A. I've seen versions of this before.

Q. When you say versions of this, what do you mean?

A. Well, something that starts out with John Thompson and then says reinstatement of the questionnaire. I -- I've -- this is -- I recall seeing something like this in different versions --

Q. This is --

A. -- at different times.

Q. Okay. And just so the record is clear, this is a -- a draft of a letter from the Department of Justice to the Commerce Department requesting the reinstatement of a question on the 2020 census questionnaire related to citizenship, correct?

A. Do we know that it's from DOJ? Oh, because it says --

Q. Do you see the last line?

A. -- for doj.gov.

Q. Yes.

A. So what was the question again?

Q. So this is a draft of a letter from DOJ to

the Commerce Department requesting a reinstatement of a citizenship question on the 2020 --

A. Right.

Q. -- census, right?

MR. ROSENBERG: Objection, form, assumes facts not in evidence.

A. I -- I -- I -- it seems to be that.

Q. (By Mr. Duraiswamy) Okay. And when did you -- or who -- who provided you with versions of this draft letter?

A. I'm not sure which version this is. Again, I'm familiar with the letter. I'm not sure who the original author is. I'm sure that I looked at it. I might have commented on it, but I'm not sure who writes a first -- a first template, as it were. What's interesting is when I look at this, it seems like --

MR. FELDMAN: And this being?

A. This being the version that you're looking at right now.

MR. FELDMAN: Exhibit 18.

A. And I look at the letter that I first saw in ProPublica. This letter is very different than the letter that ultimately went from DOJ.

Q. (By Mr. Duraiswamy) Okay. In order to help

us all get out of here on time, I'm going to ask you try to --

A. Oh, we're all going to get here on -- out of here on time.

Q. Well, I want you -- in order to avoid the risk of our having to come back and do more questioning, I want to you to try to focus on just answering the question --

A. Right.

Q. -- that I've asked. So my question, you stated that you had previously seen a version of this draft, correct?

A. Correct.

Q. Okay. And I believe you said --

A. And, again, there are people within the Secretary's office who could have had a version, could have had -- marked up their own version, could have -- again, trying to figure out who an original author is when this looks a little --

MR. FELDMAN: The question --

Q. (By Mr. Duraiswamy) Yeah.

MR. FELDMAN: Just --

Q. (By Mr. Duraiswamy) I don't -- I don't want -- I don't -- I'm not asking you to tell me about who the original author was or anything. I want to

try to ask about your experience with this --

A. Right.

Q. -- with versions of this draft letter. Okay? Do you recall who provided you with a -- a version of this draft letter?

A. No.

Q. Presumably, you -- well, strike that.

You said you might have commented on it. Do you recall what comments you may have made on the draft letter?

A. I don't recall.

Q. Do you recall why you were reviewing it?

A. I was comparing this to that ACS letter. So again, how does DOJ interact with Census on data needs.

Q. Why were you comparing it to the ACS letter?

A. Process. I'm a process person.

Q. But I'm -- I'm --

A. If you want --

Q. -- trying to understand why specifically you were asked to or took the initiative to compare a draft version of this letter to the ACS letter that we talked about before.

A. Again, I want to make sure that if the department has an interest in evaluating a change in

the questionnaire, that they're following procedures. This clearly doesn't look like the -- the letter that actually went out, but it looks like almost a placeholder, a template.

Q. When you say you want to make sure that if the department has an interest in evaluating a change in the questionnaire, you're referring to the -- the Department of Commerce --

A. Correct.

Q. -- correct?

A. Correct.

Q. Okay. And you recall that others at the Department of Commerce were reviewing and offering thoughts on draft versions of this letter?

A. I seem to recall that, yes.

Q. Who do you recall was involved in that effort?

A. It might have been the general counsel's office, and it might have been the policy office. And again, blurring a lot of those people, interactions together, new people coming on board, Peter Davidson coming on board, Earl being involved in policy matters, people that work for Earl. There are a lot of cooks in the kitchen.

Q. Other than Mr. Davidson and Mr. Comstock,

who you just mentioned, are there other specific people that you recall being involved in that process?

A. Maybe --

MR. ROSENBERG: Objection, mischaracterizes testimony.

MR. FELDMAN: Go ahead.

A. Maybe Izzy Hernandez, maybe Sahra Park-Su. You know, when I think of the policy people, they're all sort of blended together, the general counsel's people and so forth.

Q. (By Mr. Duraiswamy) Do you recall any specific comments or edits that you suggested to the draft version of this letter?

A. I don't recall, but I'm sure that I made comments.

Q. You just don't remember specifically what the comments were?

A. Right, right.

Q. Do you remember who you made the comments to or who you provided the comments to?

A. They would have been within that group of people, and I would -- I would -- you know, when I say general counsel, I -- I include James in that too.

Q. Okay.

A. And in this --

Exhibit E

Comparison of the Purported 2015 Hofeller Study, the Gary Letter, and the *Amicus* Brief of Former Directors of the U.S. Census Bureau in *Evenwel* v. *Abbott*, 136 S. Ct. 1120 (2016)

Purported Hofeller 2015 Study	Gary Letter	Former Census Bureau Directors' *Evenwel* Brief
In decennial censuses prior to 2010, a citizenship question was included in the long form questionnaire which was distributed to approximately one in seven households… For several reasons, the Bureau of the Census decided to discontinue the use of the long form questionnaire for the 2010 Decennial Census and to depend exclusively on the short form Questionnaire, which did not include a question on citizenship… As a replacement to the long form questionnaire, the Census Bureau instituted the American Community Survey. To quote the Census Bureau: "The American Community Survey (ACS) is an ongoing survey that provides vital information on a yearly basis about our nation and its people. Information from the survey generates data that help determine how more than $400 billion in federal and state funds are distributed each year." Each year, about 3.5+ million households receive very detailed questionnaires of which about 2.2 million are successfully returned. This represents a 62% return rate.	From 1970 to 2000, the Census Bureau included a citizenship question on the so-called "long form" questionnaire that it sent to approximately one in every six households during each decennial census…. In the 2010 Census, however, no census questionnaire included a question regarding citizenship. Rather, following the 2000 Census, the Census Bureau discontinued the "long form" questionnaire and replaced it with the American Community Survey (ACS). The ACS is a sampling survey that is sent to only around one in every thirty-eight households each year and asks a variety of questions regarding demographic information, including citizenship. See U.S. Census Bureau, American Community Survey Information Guide at 6, available at https://www.census.gov/content/dam/Census/pro gramssurveys/acs/about/ACS Information Guide.pdf (last visited Nov. 22,2017). The ACS is currently the Census Bureau's only survey that collects information regarding citizenship and estimates citizen voting-age population.	From 1970 to 2000, the Census Bureau also sent a "long form" to approximately one in every six households. This "long form" was used to collect answers to a wider array of questions, including demographic, economic, social, and housing questions, as well as inquiring about citizenship status. Following the 2000 Census, the decennial "long form" was discontinued and was replaced by a continual sampling program called the American Community Survey ("ACS"). ACS collects the same type of information that was included on the long form, but does so on a continuous basis throughout the decade.[8] Each month, about 295,000 addresses are mailed the ACS questionnaire, for a total of 3.5 million households a year, or roughly one in thirty-eight households. [FN8]: *See* U.S. Census Bureau, *American Community Survey Information Guide* …. The actual number of voting age citizens in each state is unknown. The only information in existence is ACS's statistical sample-based estimates.

Purported Hofeller 2015 Study	**Gary Letter**	**Former Census Bureau Directors' *Evenwel* Brief**
In addition, the use of a 5-year rolling sample was much less reflective of the actual characteristics of the population at the time of the actual 2010 Decennial Enumeration. which would have been a one-time snapshot taken in mid-2010 (April to August).	Because the ACS estimates are rolling and aggregated into one-year, three-year, and five- year estimates, they do not align in time with the decennial census data. Citizenship data from the decennial census, by contrast, would align in time with the total and voting-age population data from the census that jurisdictions already use in redistricting.	As an initial matter, the ACS estimates do not align with the timing of congressional apportionment or traditional legislative apportionment. States traditionally redistrict their state legislative districts at the same time as their congressional districts, using the same decennial Census count …. To begin, only the five-year information could be used because the one- and three-year reports are not statistically reliable at the small geographic units used to draw district boundaries. … First, with respect to the ACS five-year survey, eighty percent of the data is already between two and five years old at the time of redistricting.
Another issue with use of the ACS in redistricting is that the accuracy for small units of geography is extremely poor. This is particularly true for Census Tracts and Census Block Groups. In some cases the confidence interval for a Block Group exceeds the actual range of the data, creating negative numbers for the low point of the confidence interval.	The ACS estimates are reported at a ninety percent confidence level, and the margin of error increases as the sample size—and, thus, the geographic area—decreases.	The ACS reports margins of error at the ninety percent confidence level. … The margin of error grows as the sample size decreases, so the smaller the area, the higher the possibility of error.

Purported Hofeller 2015 Study	**Gary Letter**	**Former Census Bureau Directors' *Evenwel* Brief**
Another problem with the ACS data is that the units of geography by which the ACS is compiled is different from the geographic units used in redistricting. Almost all states are using Census Voting Districts (VTDs) are preferred as the basic geographic building blocks for creating new districts. VTD boundaries generally follow precinct boundaries. ACS data are simply not available for VTDs, and any estimates of CVAP populations for VTDs would be even more inaccurate than the ACS estimates for Census Tracts and Block Groups. For those states in which CVAP estimates for legislative districts have been compiled, determinations have been required to compute the percentage of each Census Block Group's population which is in each legislative or congressional district. The CVAP statistics have been summed for all the block groups which have either 50% or 75% of their population in an individual district and these estimates have been imputed to the total adult populations of the districts.	Census data is reported to the census block level, while the smallest unit reported in the ACS estimates is the census block group. See American Community Survey Data 3, 5, 10. Accordingly, redistricting jurisdictions and the Department are required to perform further estimates and to interject further uncertainty in order to approximate citizen voting-age population at the level of a census block, which is the fundamental building block of a redistricting plan. Having all of the relevant population and citizenship data available in one data set at the census block level would greatly assist the redistricting process.	An additional problem is that ACS estimates are not available at the smallest geographical level that is actually used for purposes of redistricting—the Census block. The smallest geographic level at which ACS estimates can accurately be utilized is the block group level. [citation] This would pose significant problem for states seeking to evenly populate districts. … States need data at granular levels in order to make a good-faith effort to equalize population to the extent possible among districts. [citations] Without the granular Census block data typically used to balance population between and among districts, states relying on ACS voting age citizen estimates likely will be unable to satisfy the standard this Court requires for legislative redistricting.

Exhibit F

Nos. 19-1382 (L), 19-1425 (Cross-Appeal)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

La Unión Del Pueblo Entero, *et al.*,

Plaintiffs-Appellees/Cross-Appellants,

v.

Wilbur L. Ross, *et. al.*,

Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the District of Maryland (8:18-cv-01570-GJH and 8:18-cv-01410-GJH)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and Local Rule 26.1, all of the Plaintiffs hereby disclose the following:

1. No party is a publicly held corporation or other publicly held entity.
2. No party has any parent corporations.
3. No publicly held company owns 10% or more of the stock of a party.
4. No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation.
5. No party is a trade association.
6. The case does not arise out of a bankruptcy proceeding.

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JURISDICTIONAL STATEMENT

Plaintiffs filed this action pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C § 701, and the United States Constitution, Art. I, §2, Cl. 3, and Amend. V. The district court exercised subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, and 5 U.S.C. §§ 702 and 704. Plaintiffs filed a timely notice of cross-appeal on April 16, 2019. This Court's appellate jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Whether the district court erred in denying Plaintiffs' equal protection claim under the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

STATEMENT OF CASE AND FACTS

Plaintiffs challenge the inclusion of a citizenship question on the 2020 Census. Plaintiffs in this appeal, *LUPE v. Ross*, No. 8:18-cv-1570-GJH (D. Md.), were consolidated in the district court with plaintiffs in *Kravitz v. Department of Commerce*, No. 8:18-cv-1041-GJH (D. Md.). Plaintiffs' claims arose under the APA and the Enumeration and Due Process Clauses of the Constitution. *LUPE* Plaintiffs also alleged a conspiracy to violate their civil rights under 42 U.S.C. § 1985. Following trial, the district court ruled in favor of Plaintiffs on their claims under the APA and the Enumeration Clause, and denied Plaintiffs' claims under the Due Process Clause and 42 U.S.C. § 1985. JA 2844. The district court entered

its final judgment and its order enjoining the addition of the citizenship question on April 5, 2019. JA 2963. Defendants timely appealed, and the *LUPE* Plaintiffs timely cross-appealed. This briefing addresses only the *LUPE* Plaintiffs' equal protection claim under the Due Process Clause of the Fifth Amendment.

A. Genesis of the Plan to Add the Citizenship Question

On March 26, 2018, Secretary Wilbur Ross issued a directive to the Census Bureau to add a citizenship question to the 2020 Census (the "Ross Memo"), a directive he claimed was prompted by a December 2017 request from the Department of Justice ("DOJ"). JA 2851. The district court made extensive findings as to the actual genesis of the plan to add the citizenship question, and the multiple individuals involved in the plan. The court found that the Secretary's interest in the question surfaced on March 10, 2017, a few weeks after his confirmation, when the Secretary and his Deputy Chief of Staff Earl Comstock exchanged emails regarding whether "undocumented residents" are "included in the apportionment population counts," and Comstock included the text of a Wall Street Journal article titled "The Pitfalls of Counting Illegal Immigrants." JA 2851-52. Indeed, very early in his tenure, the Secretary spoke with various "senior Administration officials" about adding the citizenship question. JA 2852. The following month, in April 2017, at the behest of then-White House Chief Strategist Steve Bannon, the Secretary spoke with Kansas Secretary of State Kris Kobach

about the "potential effect adding 'one simple question' to the Census would have on 'congressional apportionment.'" *Id.* The district court found that in April 2017, Comstock was also communicating with the Census point person for President Donald J. Trump's transition team and the Secretary's "trusted" advisor, A. Mark Neuman, about the congressional notification process to add the question. JA 2852, 2857.[1] Secretary Ross sent an email one week later insisting that the citizenship question issue be resolved, and in early May 2017 he complained to Comstock that he was "mystified why nothing [has] been done in response to my months old request that we include the citizenship question," and that "worst of all [the Census Bureau] emphasized that they have settled with congress on the questions to be asked."[2] JA 2853. Comstock responded that he would "work with Justice to get them to request" the addition of the citizenship question to the Census, and he and other Department of Commerce ("Commerce") staff immediately began to implement the plan and to search for a willing federal agency to make the request. JA 2853.

[1] Recently discovered evidence detailed in Plaintiffs' pending Rule 62.1 motion before the district court confirms that the Trump transition team was already pressuring Commerce to add the question. *See infra* Sec, D, Newly Discovered Evidence; JA 2968 (Rule 62.1 motion).

[2] Consistent with Census Act requirements, 13 U.S.C. § 141(f), Commerce timely transmitted to Congress in early April 2017 the five planned subjects for the 2020 Census: age, gender, race/ethnicity, relationship, and tenure (owner/renter). JA 2852-53. The report did not include citizenship. *Id.*

The district court made extensive findings regarding Comstock's subsequent meetings and conversations with agencies he hoped would agree to make the request, including the White House Liaison at DOJ, the head of DOJ's Executive Office of Immigration Review, and staff at the Department of Homeland Security ("DHS")—all of whom declined to participate in the plan. JA 2853-60, 2875-76, 2951. The district court's findings also include exchanges between the Secretary and other Commerce staff, and between Commerce and Census Bureau staff, echoing the concern that "illegal immigrants" are counted in the Census. JA 2854-55.

By mid-July 2017, Kobach again implored the Secretary to add the question to address the "problem that aliens who do not actually 'reside' in the United States are still counted for congressional apportionment purposes." JA 2855. Noting that his discussion about the citizenship question was "at the direction of Steve Bannon," Kobach contacted the Secretary a few days later, by email and by phone. JA 2855-56. By August, the Secretary told Comstock that he would call then-Attorney General Jeff Sessions personally. JA 2856. In response, Comstock emailed the Secretary that a memorandum and full briefing were being prepared on the citizenship question, and that "[s]ince the issue will go to the Supreme Court we need to be diligent in preparing the administrative record." *Id*. The Secretary admonished that the team "should be very careful, about everything, whether or

not it is likely to end up in the [Supreme Court]." *Id*. Further exchanges followed between the Secretary and Commerce senior staff, until finally, "impatient with [Commerce's] failed efforts, Secretary Ross implemented his earlier promise to take the matter of inquiring whether DOJ would request inclusion of a citizenship question into his own hands by involving Attorney General Jeff Sessions." JA 2856-57 (internal citation omitted). All of the calls to DOJ were initiated by Commerce. JA 2858 n.9. At least one of several calls from the Secretary to Sessions occurred on September 18, 2017. JA 2858. On November 27, 2017, the Secretary wrote to his General Counsel, Peter Davidson, "We are out of time. Please set up a call for me tomorrow with whoever is the responsible person at Justice. We must have this resolved." JA 3792.

Finally, on December 12, 2017, the DOJ sent a letter to the Census Bureau "requesting" that they add a question to the Census (the "DOJ Letter"). JA 2858, 3532 (DOJ Letter). In the letter, the DOJ stated that it needed a citizenship question to collect citizenship data to better enforce the Voting Rights Act of 1965 ("VRA"). JA 2859. The author of the letter, according to evidence discovered during the district court proceedings, was then-acting Assistant Attorney General

John Gore, with input from Commerce.[3] JA 2877-78; *see also infra* Sec. D, Newly Discovered Evidence.

The district court further found that the Census Bureau was kept in the dark about Commerce's plan until after Commerce maneuvered DOJ into officially requesting the addition of the citizenship question. *See* JA 2860. Only after receiving the DOJ Letter did the Census Bureau begin to evaluate the impact of a citizenship question on the accuracy and cost of the 2020 Census. *Id.* The Census Bureau "repeatedly, consistently, and unanimously recommended against adding a citizenship question to the 2020 Census," and provided Commerce with alternatives that would be more accurate, more efficient, and less costly. JA 2860-65. The Census Bureau also unequivocally warned the Secretary and Commerce that the addition of the citizenship question would harm Latinos and noncitizens. JA 2886-88; *see also* JA 2889-90.

The Secretary ignored the Census Bureau's unanimous and consistent warning that the addition of the citizenship question would lower response rates and data quality, and he dismissed their insistence that there was a less costly, more accurate method to collect citizenship data. JA 2860-65. DOJ was as

[3] Arthur Gary is the signatory of the letter, and is the same person who one year earlier notified Commerce that DOJ had no need to amend the content of the American Community Survey ("ACS"), which collects citizenship data used in VRA enforcement actions, except to consider adding a new LGBT-related question. JA 2858.

uninterested in that solution as was the Secretary. JA 2878-79. Ten days after formally receiving the DOJ Letter, Acting Census Bureau Director Ron Jarmin, per standard practice, invited DOJ to discuss the Census Bureau's recommendation that a linked file of administrative and survey data already in the possession of the Census Bureau would more accurately and more cost effectively provide the data DOJ requested. JA 19, 2878-79. The meeting between Census Bureau and DOJ experts was cancelled at the direction of Sessions, who instructed his staff not to attend—a move that was "very problematic" for DOJ, and one that Chief Scientist for the Census Bureau, Dr. John Abowd, believed constituted problematic "political influence[.]" JA 2878-79.

The district court's findings confirm that despite the Census Bureau's warnings, the Secretary and his staff nonetheless persisted. JA 2865. Kobach also persisted, and sent yet another communication to the Secretary in February 2018, repeating "his interest in including the question for 'election-related reasons'" and "implying that undocumented immigrants are not 'residents' for purposes of apportionment." JA 2865-66. The Census Bureau continued to caution against adding the question, even if done in combination with the use of administrative records, because this would be less accurate and more burdensome. JA 2866.

On March 20, 2018, six days before the issuance of the Ross Memo, the Secretary deliberately misled Congress about the true origin of and rationale for

the question. *See* JA 2874-75, 2952 n.27; *see also* JA 5222 (video of testimony). Although he acknowledged that he was aware of a Trump campaign email advocating for the addition of a citizenship question,[4] the Secretary nonetheless insisted that the Census Bureau's research into the topic was "solely" in response to the DOJ Letter, and not at the direction of anyone at the White House. *See id*. Two days later, on March 22, 2018, the Secretary continued the ruse by testifying again before Congress that DOJ "initiated" the process to add the citizenship question. JA 2875; JA 5273 (transcript of testimony).

Even after the lawsuits challenging the addition of the citizenship question were filed in New York, California, and Maryland, as recently as April 2018, DOJ and Commerce took pains to hide the fact that it was the Secretary who demanded that DOJ make the request for the question, not the other way around. A series of talking points used by Sessions to prepare for *his* congressional testimony on the topic of the Census begins with the following reminder: "**NOT PUBLIC**: In 2017, [the Secretary] requested that [DOJ] send a letter requesting the addition of a citizenship question on the 2020 Census." JA 2879. Sessions literally prepared himself to conceal from Congress the steps the Secretary took to manufacture an after-the-fact motive for adding the question.

[4] The district court found that before the Secretary issued the Ross Memo, the Trump/Pence election campaign indirectly communicated that President Trump wanted the citizenship question added to the Census. JA 2874.

The district court further found that the Ross Memo itself misrepresents the origin of and rationale for the request to add a citizenship question because it attributes the initiation of the request and all that followed to the DOJ Letter.[5] *See* JA2853-60 (section titled "Manufacturing DOJ's VRA Rationale"). The Ross Memo also incorrectly claims that the Census Bureau could not "document that the response rate would in fact decline materially," and that there will be no additional burden on respondents. JA 2865-67, 2942-47. The Ross Memo also directly contradicts evidence regarding the negative effect of the citizenship question on the Census Bureau's ability to match responses with administrative records, JA 2869-70, 2944-46, and falsely represents that the citizenship question was "well tested," *see* JA 2870.

Significantly, the district court found that this history "undermines the assertion that the requested data were of great importance to DOJ." JA 2870. The district court concluded that the "VRA rationale was a pretext, and the statements in the Ross Memo contradict the unanimous opinion of the Census Bureau that

[5] The Ross Memo further sets forth additional misrepresentations about the addition of the citizenship question and deviation from the normal, well-established process by including references to statements from a Nielsen executive that adding sensitive questions to short survey forms could be done "without any appreciable decrease in response rates." JA 2872. Rather, the district court found evidence in the Administrative Record that Nielsen executives believe that "the reinstatement of a citizenship question could lead to a lower response rate [,]" and that they "*noted the importance of testing questions*." *Id.* at 30 (emphasis added).

DOJ's stated goal could be achieved through a superior alternative," and disregards the Bureau's warning that adding the question would "harm[] the overall quality of Census data and increas[e] costs and respondent burden." JA 2851; *see also* JA 2951-54.

B. Anti-Immigrant Statements By Officials

President Trump's campaign claimed that he "officially mandated" that the citizenship question be added. JA 2884. Regardless of whether the campaign statement is truthful or reflects a campaign simply trying to give the President a "win," the anti-immigrant political climate fueled by President Trump's statements was thriving during the relevant period. The district court found that the "[t]rial Record [] includes several statements by candidate, President-elect, and President Trump demonstrating his animus toward immigrants," including "statements in tweets and other mediums that show President Trump is concerned by the political power that undocumented immigrants may wield." JA 2884. On May 21, 2018, the White House published an article on its website that used the term "animals" no less than ten times to describe individuals attempting to enter the country. JA 6930. Also, on May 25, 2016, President Trump tweeted, "The protestors in New Mexico were thugs who were flying the Mexican flag. The rally inside was big and beautiful, but outside, criminals!" JA 4669. The trial record additionally confirms that on October 9, 2017, as discussions about the citizenship question

between Commerce and DOJ were ongoing, the Secretary issued a press release applauding Trump Administration priorities to "swiftly return illegal entrants" and to "stop sanctuary cities, asylum abuse and chain immigration." JA 6758. On November 27, 2016, President Trump tweeted, "[i]n addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally." JA 4671.

C. The Secretary Was Not the Sole Decision-maker

The district court found that Plaintiffs "presented evidence that the President and Kobach harbored discriminatory animus towards non-citizens and evidence that the Secretary considered the impact of counting illegal immigrants in the Census, among other undisclosed issues." JA 2885. Based on evidence in the Administrative Record, the district court found that the Secretary consulted with and was influenced by others that sought to depress response rates among Latinos, immigrants of color, and those that live in households with or in close proximity to them. *See* JA 2865-74. Those who collaborated with him and others in the Commerce Department include Kobach, Trump transition team members, White House officials, Neuman, and Sessions, all of whom worked together to accomplish the goal of adding the question and misrepresenting the motivation. *Id.*; *see also* JA 2877.

D. Newly Discovered Evidence

Currently pending before the district court in the *State of New York v. U.S. Dep't of Commerce (New York)*, No. 18-CV-2921 (S.D.N.Y.), case and the district court in this case are motions based on the discovery of new evidence.[6] This evidence confirms that a Republican strategist, Thomas Hofeller, urged the Trump transition team to add a citizenship question to the 2020 Census, based on his 2015 study concluding that adding the citizenship question would advantage Republican and non-Hispanic white voters. JA 3066. In his study, Hofeller detailed how adding a citizenship question to the 2020 Census would be necessary in order to switch from using total population to citizen voting age population ("CVAP") for redistricting. Hofeller used Texas as a case study, and showed that the use of CVAP would in turn reduce the number of districts in South Texas, El Paso, and the Rio Grande Valley, and would eliminate five of the current thirty-five Latino majority House districts. JA 3063-64. Hofeller concluded that using CVAP would "be advantageous to Republicans and [n]on-Hispanic [w]hites," and that any such proposal would "provoke a high degree of resistance from Democrats and the major minority groups in the nation." JA 3066. The new evidence also shows that

[6] Plaintiffs in the *New York* case filed a motion for an order to show cause whether sanctions or other appropriate relief are warranted in light of new evidence that contradicts the sworn testimony of Neuman, advisor to Secretary Ross, and Gore, of the DOJ. JA 3000-29.

Hofeller penned the paragraph of the draft letter that Neuman provided to Gore that asserted the pretextual VRA enforcement rationale. JA 2991, 3125-26.

Neuman served as the point person for all issues related to the Census during the Presidential transition from 2016 to 2017, and went on to serve as a "trusted advisor" to Secretary Ross on Census issues. JA 2852, 2857. This evidence is consistent with a March 29, 2019 interview given by Gore to the Congressional Committee on Oversight and Reform, where he first testified that Davidson referred him to Neuman, who provided to Gore, by hand-delivery, "a draft letter that would request reinstatement of the citizenship question on the census questionnaire." JA 3115, 3118.

The newly revealed documents demonstrate that the addition of the question was in fact motivated by an explicit, racially discriminatory scheme to dilute the representation of Latinos and increase the over-representation of whites. These documents dispel any "mystery" behind the Secretary's real purpose in orchestrating the VRA rationale, eliminate any doubt about the discriminatory purpose in adding the citizenship question, and directly connect that discriminatory purpose to the Secretary and Commerce, DOJ, Administration and transition team officials who conspired with Kobach to add the citizenship question to the 2020 Census.

SUMMARY OF ARGUMENT

The district court erroneously denied Plaintiffs' equal protection claim because the court failed to engage in the totality of the circumstances analysis required by *Village of Arlington Heights v. Metropolitan Housing Development Corporation (Arlington Heights)*, 429 U.S. 252, 264-68 (1977). Instead, the district court summarily denied the claim for lack of direct evidence that the Secretary harbors discriminatory animus toward non-citizens and Hispanics. The district court's findings of fact wholly support a finding of intentional discrimination, but the district court failed to examine those findings within the *Arlington Heights* framework. Regardless of the Supreme Court's decision regarding the APA and the Enumeration Clause claims in the *New York* case, the summary treatment the district court accorded Plaintiffs' equal protection claim is reversible error.

That the district court erroneously required direct evidence of the Secretary's state of mind with regard to his racial animus is clear from the following findings of fact:

> At best, the Secretary ignored clear evidence that the citizenship question would harm the distributive accuracy of the Census *for some mysterious reason known only to him*. At worst, *the Secretary intended to negatively affect* the distributive accuracy of the Census by reducing immigrant response rates to the Census.
>
> . . . .
>
> . . . Outside of demonstrating that a citizenship question will disparately impact Hispanics, Plaintiffs have offered little, if any

> evidence, *showing Secretary Ross harbors animus* towards Hispanics or that such animus impacted his decision.
>
> . . . .
>
> . . . Without more evidence demonstrating the Secretary was *actually persuaded* to make his decision *based on discriminatory animus*, a finding that, more likely than not, *the Secretary's real motivation* was to depress immigrant response rates cannot be made. *Ultimately, Secretary Ross's original rationale remains, to some extent, a mystery*.

JA 2955-56, 2959, 2885 (emphasis added).

It is not surprising that Plaintiffs were not able to provide direct evidence of whatever animus the Secretary harbored, or whether he shared the racial animus displayed by Trump and by others in his administration who prevailed upon him to add the question, given that Plaintiffs were barred from deposing the Secretary, Bannon, and Kobach. *LUPE v. Ross*, No. 18-CV-1570, Order, ECF 81 (Nov. 9, 2018); Order, ECF 97 (Dec. 28, 2018); *In re Dep't of Commerce*, 139 S. Ct. 16, 16-17 (2018).[7] However, this is precisely why *Arlington Heights* counsels for an intense examination of the procedural and substantive history of this issue: the

[7] In addition to the instant consolidated cases, the *New York* case consolidated the following cases for the purposes of discovery: *New York v. United States Department of Commerce*, 1:18-cv-02921-JMF (S.D.N.Y.); *New York Immigrant Coalition v. United States Department of Commerce*, No. 1:18-cv-05025-JMF (S.D.N.Y.); *California v. Ross*, No. 3:18-cv-01865-RS (N.D. Cal.); *City of San Jose v. Ross*, No. 5:18-cv-02279-RS (N.D. Cal.). *See New York v. United States Dep't of Commerce*, 1:18-cv-02921-JMF, Transcript of July 3, 2018 oral argument at 94 (S.D.N.Y. Jul. 20, 2018) (ECF No. 207, order consolidating discovery). The Supreme Court ultimately stayed the *New York* court's order allowing the Secretary's deposition. *In re Dep't of Commerce*, 139 S. Ct. 16, 16-17 (2018).

time frame, the persons involved and their relationship to the Secretary, and his efforts to conceal the steps he took to fabricate a non-discriminatory motive for the addition of the question.

In fact, direct evidence of racial animus held by governmental decision-makers is *not* required to support a conclusion that the action taken nonetheless violates equal protection constitutional guarantees. This Court previously wrote:

> Our conclusion does not mean, and we do not suggest, that any member of the General Assembly *harbored racial hatred or animosity* toward any minority group. But the totality of the circumstances—North Carolina's history of voting discrimination; the surge in African American voting; the legislature's knowledge that African Americans voting translated into support for one party; and the swift elimination of the tools African Americans had used to vote and imposition of a new barrier at the first opportunity to do so—*cumulatively and unmistakably reveal* that the General Assembly used SL 2013–381 to entrench itself. It did so by targeting voters who, based on race, were unlikely to vote for the majority party. Even if done for partisan ends, that constituted racial discrimination.

North Carolina State Conference of NAACP v. McCrory (*NAACP*), 831 F.3d 204, 233 (4th Cir. 2016) (emphasis added). Here, like the North Carolina legislature which acted knowing the impact their decision would have on African Americans, Secretary Ross had before him the unequivocal findings of the Census Bureau that the addition of the citizenship question would harm Latinos and noncitizens, and nevertheless ordered the addition of the citizenship question.

The Supreme Court recognizes that when a court properly considers the broader context surrounding a decision, here the addition of a citizenship question

to the 2020 Census, it does so in recognition that "[o]utright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence." *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999); *see also NAACP*, 831 F.3d at 221. Where the improper motive itself is the basis for the claim of intentional discrimination, this Court ascertains the "true motive" through an extensive analysis of pretext to determine whether a discriminatory motive was a factor in the action. *Va. Uranium, Inc. v. Warren*, 848 F.3d 590, 597-98 (4th Cir. 2017) (noting that actions arising under the Equal Protection Clause require a "more searching scrutiny" of intent to "avoid the 'circumventi[on] [of] a federally protected right.'"). Determining governmental motivation requires careful consideration in order to ensure that "a bare [] desire to harm a politically unpopular group" is not the basis for the decision." *U.S. v. Windsor*, 570 U.S. 744, 770 (2013).

The application of a totality of the circumstances analysis to the district court's factual findings leads inexorably to the conclusion that the addition of the citizenship question was executed for the purpose of depriving non-citizens and Latinos of political representation, and that the government has offered no alternative legitimate rationale. Consistent with *Arlington Heights* and *NAACP*, this Court must analyze, factor by factor, the abundant evidence in the record as reflected in the district court's findings of fact. That evidence demonstrates: 1)

that the addition of the citizenship question "bears more heavily" on non-citizens and Latinos; 2) that the historical background of the decision is rife with prevarication, manipulation, and suspect motives; 3) that there were significant departures from the "normal procedural sequence" that usually dictates when a new question may be added, including the refusal of the Secretary to take into account the unanimous recommendations of Census Bureau scientists, recommendations that are "usually considered important[;]" and, 4) that the "contemporary statements" by the Secretary and by other governmental actors who pressed Ross to move forward reflect discriminatory animus. *See Arlington Heights*, 429 U.S. at 266-68; *NAACP*, 831 F.3d at 220-21. The district court's findings contain more than enough evidence of a discriminatory motive to shift the burden to the government to provide a non-discriminatory rationale for the citizenship question, *NAACP*, 831 F.3d at 221, a rationale that the district court already found does not exist anywhere in the record.

Upon a finding of a violation of the Equal Protection Clause of the Fifth Amendment to the Constitution, this Court should reverse the judgment of the district court, JA 2844, and enter an order enjoining the addition of the citizenship question to the 2020 Census.

ARGUMENT

I. Standard of Review

Findings of fact "must not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a)(6); *NAACP*, 831 F.3d 204, 219-20. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. Gypsum Co.*, 333 U.S. 364, 395 (1948).

A finding of whether or not an action was motivated by intentional discrimination is a finding of fact. *Cromartie*, 526 U.S. at 549. An appellate court may reverse a district court's ultimate finding regarding discriminatory motive if it is clearly erroneous. *See NAACP*, 831 F.3d at 223-27 (reversing district court's failure to find discriminatory intent motivated state legislature's passage of restrictive voting laws); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 534, 537-40 (1979) (affirming court of appeals' conclusion that district court's failure to find the intentional operation of a dual school system was clearly erroneous). A finding on the question of intentional discrimination is clearly erroneous when, as here, the district court reaches its finding by misapplying the applicable law or standard. *Hunter v. Underwood*, 471 U.S. 222, 228-30 (1985) (affirming appellate court's reversal of lower court's finding that state constitutional provision was not enacted on basis of racial animus after district court failed to apply *Arlington Heights*). In

such an instance, the district court's conclusion—as it is here—is not based on a choice between two permissible views of the weight of the evidence. *See United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). Rather, the district court made all the predicate findings to support the conclusion that Defendants were motivated by discriminatory intent, but failed to apply those findings to the applicable law as required by *Arlington Heights*. 429 U.S. at 266-68. This Court need not "duplicate the role of the lower court," *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985), to find that, based on the wealth of factual findings, there was no other conclusion to be drawn but that Defendants added the citizenship question for a racially discriminatory purpose. S*ee NAACP*, 831 F.3d at 238.

II. The District Court Failed to Undertake the Sensitive Inquiry into the Totality of the Circumstances, as Required Under Arlington Heights.

The Supreme Court in *Arlington Heights* provided a framework for examining the totality of the circumstances surrounding a governmental decision in order to determine whether racial discrimination motivated the action. 429 U.S. at 264-68. The Supreme Court has recognized that "[o]utright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence." *Cromartie*, 526 U.S. at 553; *NAACP*, 831 F.3d at 221. Governmental actions that are not racially discriminatory on their face can nonetheless violate constitutionally guaranteed protections. *NAACP*, 831 F.3d at

220.

Arlington Heights identified a non-exhaustive list of factors that may constitute part of the mosaic of evidence that can give rise to an inference of discrimination: (1) disparate impact, *i.e.*, whether the action "bears more heavily on one race than another[;]" (2) the "historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes[;]" (3) "[d]epartures from the normal procedural sequence" and "[s]ubstantive departures[,]" "particularly if the factors usually considered important . . . favor a decision contrary to the one reached[;]" and (4) "contemporary statements" by those deciding the issue. *Arlington Heights*, 429 U.S. at 266-68 (internal quotations and citations omitted).

In its reversal of the lower court in *NAACP*, the Fourth Circuit applied the *Arlington Heights* factors to enjoin provisions of a North Carolina election law after concluding that the district court erred when it failed to find the provisions racially discriminatory. *NAACP*, 831 F.3d at 223-38. The Fourth Circuit examined North Carolina's history of racial discrimination in voting, the specific sequence of events leading up to the passage of the law, the legislative history of the law, and the disproportionate impact of the law on African-American voters, finding that all of those factors weighed in favor of finding that the law was motivated by discriminatory intent. *Id*. A comparable *Arlington Heights* totality

of the circumstances analysis of the district court's factual findings similarly leads to the conclusion that Defendants were motived to add the citizenship question by their racially discriminatory desire to reduce Latino and non-U.S. citizen political representation.

A. *Arlington Heights* Factor 1: The District Court Findings Demonstrate That Plaintiffs Will Be Disparately Impacted by the Addition of a Citizenship Question to the 2020 Census.

The district court's extensive findings confirm that the "clear pattern" of disparity that emerges from the impact of the citizenship question is of the kind described in *Arlington Heights*, 429 U.S. at 266, and is sufficient to establish one of the circumstances supporting a finding of discriminatory intent, *NAACP*, 831 F.3d at 231. Indeed, the district court acknowledged that Plaintiffs demonstrated the impact necessary to support a finding of discriminatory intent. JA 2885 n.11, 2959.

Specifically, the district court's opinion finds "[o]verwhelming evidence. . . that a citizenship question will cause a differential decline in Census participation among noncitizen and Hispanic households." JA 2886. One basis for this finding is the Census Bureau's own conservative estimate of a 5.8% differential decline in self-response for non-citizen households. JA 2889-90. Additionally, based on

Plaintiffs' expert testimony,[8] the district court found that Hispanic self-response will decrease by 8.7%. JA 2890-92. The court further found that those non-response rates will lead to an undercount of non-citizens and Latinos of "at the very least" two percentage points. JA 2892-903. Importantly, the court found that the Census Bureau repeatedly advised the Secretary of the likelihood of disparate impact, advice which the Secretary deliberately ignored. See JA 2860-74; 2955-56.

Finally, the court found that the effect of a differential undercount will injure Plaintiffs by causing "vote dilution due to intrastate congressional and state legislative redistricting," "malapportionment of congressional districts," and "will cause Plaintiffs' communities to lose out on federal funding." JA 2904; *see also* JA 2904-21, 2928-34.

[8] The district court found that Plaintiffs met their burden to show that scope of its review should be based on the full trial record, which includes evidence outside of the Administrative Record, because the district court made a preliminary finding of bad faith. JA 2941, 2958-59. "It would be nearly impossible to smoke out discriminatory purpose if litigants and courts evaluating whether government actors have engaged in invidious discrimination cannot look beyond the record that those very decisionmakers may have carefully curated to exclude evidence of their true intent and purpose." JA 2958 (citing *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 668 (S.D.N.Y. 2019)).

B. *Arlington Heights* Factor 2: The District Court Findings Confirm that the Historical Background Leading to the Addition of the Citizenship Question Is Replete with Ulterior Motives, Connivance, Falsehood, and Secrecy.

The "historical background" factor in the *Arlington Heights* inquiry "may take into account any history of discrimination by the decisionmaking body or the jurisdiction it represents." *Sylvia Dev. v. Calvert Cnty.*, 48 F.3d 810, 819 (4th Cir. 1995). In *NAACP* this Court reversed a district court finding that expressly recognized the long history of discrimination in North Carolina, but nonetheless ignored or minimized its relevance, and critically "failed to recognize [the] linkage" between race and party that translates "politics as usual into race-based discrimination." 831 F.3d at 223-25. The Court criticized the lower court's failure to contextualize the "powerful undercurrent influencing North Carolina politics," because those currents and their historical background are necessary considerations to properly understand the law's purpose. *Id*. at 226-27. *NAACP* establishes that *Arlington Heights* requires not just an intense examination of the history of the citizenship question and the anti-immigrant environment from which it emerged, but an understanding that such evidence is relevant to determining the motivation for the decision. The district court did not discuss this *Arlington Heights* factor in its cursory discussion of Plaintiffs' equal protection claim. *See* JA 2956-60. The district court's detailed findings glaringly illuminate the historical background and

political undercurrents—the district court's failure to apply its own findings to a totality of the circumstances analysis constitutes clear error.

First, the district court made extensive findings as to the actual genesis of the decision to add the citizenship question and the fact that it surfaced early in 2017 amidst emails concerning the inclusion of immigrants in the congressional apportionment base. *See supra* Sec. A.

Second, the findings show that the Secretary did not act alone. He was contacted multiple times by White House officials, a member of the Trump transition team, and Kobach, among others, about adding the question for congressional apportionment purposes, and the Secretary worked with these individuals to research the issue and to manufacture the pretextual VRA rationale for adding the citizenship question.[9]

Third, the district court's findings show that the Census Bureau conducted extensive analysis following receipt of the DOJ Letter, and "repeatedly, consistently, and unanimously recommended against adding a citizenship question to the 2020 Census," JA 2861, and warned Ross that the question would cause a disproportionate non-response rate among Latinos and non-citizens, JA 2864. The Census Bureau provided Commerce with less expensive and more accurate

[9] Newly discovered evidence recently filed in the Maryland and New York cases confirm both the orchestration of the plan to add the question and the discriminatory motive behind it. *See supra* Sec. D, Newly Discovered Evidence.

alternatives for collecting citizenship data. JA 2863. DOJ refused to meet with the Census Bureau about the superior alternatives and Commerce proceeded with its plan to add the question despite the alarms raised by the scientists at the Census Bureau. *See infra* Sec. II.C.

Fourth, the district court found that the Secretary misled Congress about the genesis of the question and the VRA rationale both during live testimony and in the Ross Memo. The Ross Memo falsely relied on the pretextual VRA rationale; downplayed the departures from usual Census Bureau procedures, including testing of new questions; misrepresented the Secretary's dealings with stakeholders; and contradicted the Census Bureau's warnings about disparities in response rates and more accurate and less expensive alternatives. *See* JA 2851-85; *see also* JA 3519-27. This history, according to the district court, "undermines the assertion that the requested data were of great importance to DOJ." JA 2871.

All of the district court findings regarding the history of the citizenship question decision are based on the Administrative Record alone.[10] "Indeed, this

[10] As a result of the district court's determination that Plaintiffs were entitled to extra-record discovery, extra-record findings contain additional facts "supplementing Administrative Record evidence that the Department of Commerce manufactured the VRA rationale," supports the finding that "DOJ did not need the data it requested," confirms that Sessions "personally decided" that the DOJ would not meet with Census to pursue alternatives, gives context to the Secretary's efforts to keep the Census Bureau in the dark about his plans, details why non-compliance with pre-testing procedures was critical, and confirms that the

case presents the unusual instance in which the Administrative Record alone provides more than sufficient evidence to demonstrate not only the invalidity of the Secretary's announced decision on the conventional grounds set forth in APA § 706(2) but also the pretextual nature of the Secretary's stated reasons in his March 26 Memorandum announcing the decision." JA 2941. The district court's failure to consider the historical context of the decision in an *Arlington Heights* analysis was clear error.

C. *Arlington Heights* Factor 3: The District Court Found that Defendants Departed, Procedurally and Substantively, From Past Practice.

Arlington Heights requires an examination of the "specific sequence of events leading up to the challenged decision," with a critical eye toward "[d]epartures from the normal procedural sequence," which may demonstrate "that improper purposes are playing a role." 429 U.S. at 267.

In its examination of the route taken by legislators to pass election laws in North Carolina, for example, this Court adopted district court findings that the bill was rushed through the process to avoid in-depth scrutiny, that it was afforded far less debate than was normally offered, and that it targeted African American voters. *NAACP*, 831 F.3d at 227-29. Finding error in the district court's

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Secretary looked at the issues of whether undocumented immigrants are counted in the Census for apportionment purposes. JA 2874-85.

"accepting the State's efforts to cast this suspicious narrative in an innocuous light," the Court held that such departures, even as other procedural rules were adhered to, provided "another compelling piece of the [motivation] puzzle." *Id*. at 228-29.

The district court here found that the Census Bureau has a "well established" process for adding or changing the content on the Census. *See* JA 2871.[11] Had the procedure for adding a question to the decennial Census proceeded normally: first, there would have been a request by an agency for data; second, the Census Bureau would have considered the request and determined how to provide the most accurate data at the lowest cost that best fit the needs of the requesting agency; third, the question would have undergone extensive testing, and the Census Bureau would have made a recommendation to the Secretary of Commerce; and fourth, by March 28, 2017, the question would have then been included in the report, as mandated by the Census Act, to Congress on the subjects to be covered. In order to follow the "well-established" process, these steps would have been initiated early to mid-decade. Instead, as discussed below, none of these normal procedures

[11] The district court lays out the "well-established process" for adding content to the census to ensure compliance with legal and regulatory requirements established by Congress. JA 2871. The process involves, *inter alia*, extensive testing, review, and evaluation upon a federal agency identifying data needs requiring additions or changes to the current questions; these changes must demonstrate a clear statutory or regulatory need for data, and must go through extensive cognitive and field testing. *See* JA 2871-72.

were followed and what ensued was secrecy or prevarication by Commerce, DOJ, and Trump Administration officials and others.

First, under normal circumstances an agency would have requested necessary data collection from the Census Bureau, but, as the district court found, the "request" came not from an agency needing data, rather it came from events orchestrated by Commerce staff and coordination amongst Trump administration officials and advisors, including Bannon, Neuman, Kobach, Sessions, and the Secretary himself. *See* JA 2853-60 (section titled "Manufacturing DOJ's VRA Rationale").

Second, once notified, the Census Bureau followed proper procedure and considered the "request" to determine how best to meet it, including attempting to discuss the proposed solution with the requesting agency. But the Secretary ignored the Census Bureau's unanimous recommendation that the addition of the citizenship question would lower response rates and data quality, and that there was a less costly and more accurate method to collect citizenship data through administrative records. JA 2861-63. Moreover, ten days after formally receiving the DOJ request, Jarmin, per standard practice, invited DOJ to discuss the Census Bureau's recommendation that a linked file of administrative and survey data already in the possession of the Census Bureau would provide the data DOJ requested. *See* JA 2862, 2871. DOJ, at the direction of Sessions, cancelled this

meeting. *Id*. Sessions' refusal to meet with the Census Bureau was a move that was "very problematic" for DOJ, and one that Dr. Abowd believed constituted problematic "political influence." *See* JA 2878-79.

Third, as the district court found based on the Administrative Record alone, the citizenship question was not properly tested as required by the "well-established process," and the Ross Memo misrepresented that the question was well-tested. *See* JA 2870 (finding that "[b]y labeling the citizenship question 'well tested' while failing to acknowledge the evidence that the question does not perform adequately on the ACS and ignoring the differences between the ACS and the Census questionnaire, the Ross Memo downplayed deviations from Census Bureau procedure."); *see also* JA 2869-72.[12]

Fourth, instead of following the proper process to timely and truthfully report to Congress the plans to add a citizenship question, the Secretary first

[12] Extra-record evidence not only corroborates that the "well established" process was not followed, but that Commerce officials attempted to alter the Administrative Record from including the "well established" process. *See* JA 2880. And extra-record evidence also shows that testing requirements from the "well established" process used for changes made or contemplated in the past were not followed either. *See* JA 2880.

missed the deadline, and then when he did finally report, misled Congress as to the genesis of the question. *See* JA 2874.[13]

The departures from normal procedures, the rush to cut corners as demonstrated by the sequence of events leading up to the addition of the citizenship question, and the suspicious withholding of information regarding Defendants' initial motivation driving the addition of the citizenship question "provide[] another compelling piece of the puzzle" of Defendants' discriminatory motivation. *NAACP*, 831 F.3d at 229.

D. *Arlington Heights* Factor 4: The Record Contains Contemporary Statements by Those Involved in Ensuring that the Secretary Carried out the Administration's Intent to Discriminate Against Immigrants and Communities of Color.

Arlington Heights factor four considers evidence of "contemporary statements" by those deciding the issue. 429 U.S. at 268. This Court recognizes that officials acting in their official capacities "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority" and that "it is rare that these statements can be captured for purposes of proving racial discrimination in a case such as this." *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1064 (4th Cir. 1982). This Court

[13] Sessions prepared himself for his congressional testimony with an internal memo reminding him to conceal from Congress the steps the Secretary took to manufacture an after-the-fact motive for adding the question. *See* JA 2879.

also considers statements from other party leaders—not just those that officially ordered the challenged actions—as "evidence of the racial and partisan political environment" in which the challenged action was taken. *NAACP*, 831 F.3d 204, 229 n.7 (4th Cir. 2016) (considering "the sheer outrageousness" of public statements made by other party leaders).

The district court findings here confirm that there were multiple officials in contact with Commerce who made statements indicating they were interested in adding the citizenship question to the Census as a vehicle for affecting congressional reapportionment. *See* JA 2851-85. When multiple officials influence a final decision, the relevant inquiry is whether the decision was "tainted with discriminatory intent even if the decisionmakers personally have no strong views on the matter." *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997), *superseded on other grounds by rule as stated in Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001).[14]

[14] *See also Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 279 (E.D.N.Y. 2018) (holding that there is still liability for intentional discrimination when a "biased individual manipulates a non-biased decision-maker into taking discriminatory action"); *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1098 (N.D. Cal. 2018) (granting plaintiff's motion for a preliminary injunction and noting "even if the DHS Secretary or Acting Secretary did not personally harbor animus . . . , their actions may violate the equal protection guarantee if President Trump's alleged animus influenced or manipulated their decision making process.") (citation and internal quotation marks omitted); *see also Centro Presente v. United States Dep't of Homeland Sec.*, 332 F. Supp. 393, 415 n.3 (D. Mass. 2018) (explaining that

In addition, the district court found that the trial record contains several vituperative statements by President Trump demonstrating his racial animus toward Latinos, and that he is particularly concerned with the political power of undocumented immigrants and obsessed with purported noncitizen voting. Indeed, the district court found evidence that both the President and Kobach harbored discriminatory animus towards non-citizens, and evidence that the Secretary considered the impact of counting illegal immigrants in the Census. JA 2885.

The President's statements properly contribute to the *Arlington Heights* inquiry and raise an inference of discriminatory motive for related actions by the head of Commerce. *New York v. United States Dep't of Commerce*, 315 F. Supp. 3d 766, 810 (S.D.N.Y. 2018) (finding that President Trump's discriminatory statements "help to nudge [plaintiffs'] claim of intentional discrimination across the line from conceivable to plausible") (citing *Batalla Vidal*, 291 F. Supp. 3d at 279). The President's statements are particularly relevant because he chooses, directs, and demands loyalty from his Cabinet, and if taken at his word, he "mandated" the addition of the citizenship question. JA 4400, 4403-04.

In *CASA de Maryland, Inc. v. Trump*, Defendants "contend[ed] that the Secretary was the decision-maker, not the President, and that the Secretary's

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although the cat's paw principle originates in the employment discrimination context, "nothing in the reasoning of those opinions makes them inapplicable in a constitutional context").

decision did not involve classification of a group . . . on the basis of their individual characteristics." 355 F. Supp. 3d 307, 326 (D. Md. 2018). The district court rejected this argument, noting that "[a]n action is not cured of discriminatory taint because it is taken by an unprejudiced decision-maker who is manipulated or controlled by another who is motivated by discriminatory intent" and "there can be no doubt that if, as alleged, the President influenced the [Secretary's] decision . . . the discriminatory motivation cannot be laundered through the Secretary." *Id*. at 325-26.

Moreover, several courts have recently recognized that "there is evidence that President Trump harbors an animus against nonwhite, non-European aliens which influenced" his decision to revoke protected status from individuals from Haiti, Sudan, El Salvador, and Nicaragua. *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1100 (N.D. Cal. 2018); *see also CASA de Maryland, Inc.*, 355 F. Supp. 3d at 325 (finding that "[o]ne could hardly find more direct evidence of discriminatory intent towards Latino immigrants.").[15]

[15] Several courts have recently applied these principles to situations in which President Trump or his advisors influenced other government officials in making decisions, such as revoking protections from Deferred Action for Childhood Arrivals ("DACA") recipients and temporary protected status from residents of certain Central American, Caribbean, and African nations. *See Batalla Vidal*, 291 F. Supp. 3d at 279 (holding in DACA-rescission case that there is still liability for intentional discrimination when a "biased individual manipulates a non-biased decision-maker into taking discriminatory action"); *Ramos*, 336 F. Supp. 3d at

The district court's findings include statements of government officials advocating for the addition of the citizenship question in order to affect congressional reapportionment and redistricting, and alarm that "undocumented immigrants" were included in the Census, as well as findings that President Trump and others made statements indicating they harbor racial animus. Those findings are evidence raising an inference of discriminatory motive under *Arlington Heights'* fourth factor.

III. The District Court Failed to Properly Take Into Account the Complete Absence of a Non-Discriminatory Rationale for the Addition of the Citizenship Question under *Arlington Heights*.

Because the district court failed to engage in a totality of the circumstances analysis under *Arlington Heights*, the court did not reach the next stage of the equal protection analysis. Once the totality of the circumstances analysis establishes that race was at least one of the motivating factors behind a governmental act, the burden shifts to Defendants to "demonstrate that the law would have been enacted without this factor." *NAACP*, 831 F.3d at 233 (citing *Hunter*, 471 U.S. at 228 and *Arlington Heights*, 429 U.S. at 265-66). Crucial to this step of the analysis is the Supreme Court's admonition that "judicial deference" to the government's stated

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1098 (granting plaintiffs' motion for a preliminary injunction and noting "even if the DHS Secretary or Acting Secretary did not 'personally harbor animus . . . , their actions may violate the equal protection guarantee if President Trump's alleged animus influenced or manipulated their decisionmaking process.'") (citation omitted).

justifications "is no longer justified." *Id*. at 221.

However, in this case there can be no scrutiny of the "actual non-racial motivations" because the "only reason provided" was pretextual, and manufactured "to rationalize a decision that that already been made for other reasons." JA 2954-55. The district court found that "because the VRA enforcement rationale did not actually motivate the Secretary's decision, the Secretary has failed to 'disclose the basis of' his decision." *Id.* at 108.

The district court's findings regarding the government's failure to provide an actual non-pretextual reason for its actions contributed to the court's conclusions that the government violated the APA and the Enumeration Clause. *Id*. at 108, 111-12. In contrast, with regard to Plaintiffs' intentional discrimination claim, the absence of any non-pretextual rationale only led the court to muse that "discriminatory animus may well be the most likely explanation[.]" *Id.* at 116.

Based on the entirety of the record, there is no other rationale for the Court to scrutinize that is actual or truthful, let alone a rationale that is non-discriminatory. What remains is the conclusion that the totality of circumstances—supported by evidence under each of the *Arlington Heights* factors—cumulatively reveal that the motivation for the addition of the citizenship question was racial discrimination. *See NAACP*, 831 F.3d at 233.

IV. Invalidation Without Remand to the District Court is the Proper Remedy; This Court May Enjoin the Addition of a Citizenship Question to the 2020 Decennial Census.

"[I]f 'the record permits only one resolution of the factual issue' of discriminatory purpose, then an appellate court need not remand the case to the district court." *Id.* at 219-20 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982)); *see Easley v. Cromartie*, 532 U.S. 234, 257 (2001) (reversing, without remanding, three-judge court's factual finding that racial considerations predominated in the drawing of the challenged redistricting plan); *Hunter*, 471 U.S. at 229-30, 233 (affirming appellate court reversal without remand where district court's finding of no discriminatory purpose was clearly erroneous); *Brinkman v. Gillian*, 583 F.2d 243, 258 (6th Cir. 1978) (reversing district court's finding of no intentional discrimination with remand only to enter remedy order), *affirmed by Dayton Bd. of Educ.*, 443 U.S. at 534, 542. If, as the evidence shows, the genesis of the citizenship question was discriminatory, then the question has no legitimacy under the Constitution and this Court should invalidate the question and enjoin Defendants from adding the question to the census. *NAACP*, 831 F.3d at 239, 241 (citing *City of Richmond v. United States*, 422 U.S. 358, 378-79 (1975)).

The district court has already enjoined the government from adding the citizenship question based on violations of the APA and the Enumeration Clause. JA 2960-61. The *New York* court also enjoined the addition of the citizenship

question based on a violation of the APA, *New York* , 351 F. Supp. 3d at 675-78, and that order is now pending before the Supreme Court, where the Supreme Court heard argument on the APA and the Enumeration Clause claims.[16] Grant of Cert., *Dep't of Commerce v. New York*, No. 18-966 (U.S. Feb. 15, 2019); Order, *Dep't of Commerce v. New York*, No. 18-966 (U.S. Mar. 15, 2019) (order directing parties to brief Enumeration Clause issue). If the Supreme Court vacates the injunction entered in the *New York* case, Defendants will no doubt petition this Court to do the same with regard to the district court's injunction.

Defendants argue that the Supreme Court's decision will likely be dispositive of this appeal. Defs.' Resp. in Opp'n to Pls.' Mot. to Expedite, ECF 21 at 7. However, even if the Supreme Court rules that the addition of the citizenship question violated neither the APA nor the Enumeration Clause, and even if its holding precludes any other outcome for those claims in this case, such a holding would not automatically dictate the outcome of Plaintiffs' Fifth Amendment claim. For example, should the Supreme Court rule for Defendants on the "deferential"

[16] The California court enjoined the addition of the citizenship question on the basis of the Enumeration Clause claim, explaining that Defendants are "enjoined from including the citizenship question on the 2020 Census, regardless of any technical compliance with the APA." *California v. Ross*, 358 F. Supp. 3d 965, 1050-51 (N.D. Cal. 2019). In light of this finding, the petitioners in the New York case asked the Supreme Court to address the Enumeration Clause claim. Letter of Pet'rs' Updating Court on Related Case Filed, *Dep't of Commerce v. New York*, No. 18-966 (U.S. Mar. 11, 2019). The Supreme Court ordered briefing on this claim on March 15, 2019.

standard of review under the APA, *see Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007), it need not reach the level of scrutiny required here. Because "racial discrimination is not just another competing consideration," a court must do much more than review the proffered rationale for "arbitrariness or irrationality." *Arlington Heights*, 429 U.S. at 265-66. Deference of the kind afforded under the APA is unwarranted because a finding that Defendants' justifications are rational "is a far cry from a finding that a particular law would have been enacted without considerations of race." *NAACP* 831 F.3d at 234.

For the same reasons, a Supreme Court ruling that there was no violation of the Enumeration Clause will not preclude review of Plaintiffs' Fifth Amendment claim. Compliance with the Enumeration Clause requires that the Secretary's execution of the 2020 decennial Census "need bear only a reasonable relationship to the accomplishment of an actual enumeration[.]" *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996). Such a finding would not preclude a conclusion based on the *Arlington Heights* factors, most of which are not relevant to an Enumeration Clause inquiry, that the decision to include a citizenship question on the decennial Census was born out of improper discriminatory motives. Indeed, discrimination need not be the sole or even the primary motive for the addition of the question in order to find for Plaintiffs. *NAACP*, 831 F.3d at 220 (citing *Arlington Heights*, 429 U.S. at 265-66).

This Court has the equitable power to enter an order invalidating the addition of the citizenship question without remand to the district court, and the Court need only remand for entry of an order enjoining the addition of the citizenship question to the decennial census. *NAACP*, 831 F.3d at 239.

CONCLUSION

For the reasons set forth above, Plaintiffs request that this Court reverse the judgment of the district court with respect to Plaintiffs' claim under the Due Process Clause, invalidate the addition of the citizenship question, and enjoin its inclusion in the 2020 Census.

REQUEST FOR ORAL ARGUMENT

LUPE Plaintiffs respectfully request that this Court hear oral argument in this case. Given the complexity and record-intensive nature of this appeal, and the importance of the issue to be decided, oral argument would assist the Court's consideration of the appeal.

Dated: June 5, 2019

By /s/ Andrea Senteno

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

In accordance with Rules 32(a)(7)(B) and (C) of the Federal Rules of Appellate Procedure, the undersigned counsel for appellees certifies that the accompanying brief is printed in 14-point Times New Roman typeface, with serifs, and, including footnotes, contains no more than 13,000 words. According to the word-processing system used to prepare the brief, Microsoft Word, it contains 9,419 words.

Date: June 5, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2019, the foregoing Plaintiffs-Appellees' Opening Brief was served on all parties or their counsel of record through the CM/ECF system if they are registered users.

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Exhibit G

U.S. Department of Justice
Civil Division
Federal Programs Branch
1100 L Street, N.W.
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By ECF
The Honorable Jesse M. Furman
United States District Judge
Southern District of New York

Re: *State of New York* v. *United States Department of Commerce*, No. 18-cv-2921

Dear Judge Furman:

The Court should deny Plaintiffs' motion (ECF No. 595) to issue an order to show cause why sanctions should not be imposed. The motion borders on frivolous, and appears to be an attempt to reopen the evidence in this already-closed case and to drag this Court into Plaintiffs' eleventh-hour campaign to improperly derail the Supreme Court's resolution of the government's appeal. The Court should not countenance Plaintiffs' tactics.

1. a. At the heart of Plaintiffs' motion is their claim that then-Acting Assistant Attorney General John Gore relied on a private, unpublished 2015 study by Dr. Thomas Hofeller in drafting the Department of Justice's formal December 2017 request (Gary Letter) to reinstate a citizenship question on the 2020 decennial census. That claim is false. Plaintiffs provide no evidence that Gore ever read, received, or was even aware of the existence of that unpublished study before the filing of Plaintiffs' motion and the near-simultaneous publication of an accompanying article in the *New York Times* last Thursday morning, *see* Gov't Ex. L, much less that he had any such awareness when drafting the Gary Letter. Nor can they, because such evidence does not exist. Neither Hofeller nor his unpublished study played any role whatsoever in the drafting of the Gary Letter. There is no smoking gun here; only smoke and mirrors.

In lieu of actual, admissible evidence, Plaintiffs rely on pure speculation to conjure an imagined link between the Hofeller study and the Gary Letter based on supposed "striking similarities" between the two documents. Plaintiffs' insinuation is false. The purported "striking similarities" between the study and the Gary Letter concern their respective descriptions of the widely and publicly-known problems of using citizenship data from the American Community Survey (ACS) for estimating the citizen voting-age population (CVAP). But even a cursory comparison of the two documents shows that they are not "strikingly" similar. For example, Plaintiffs contend that the Gary Letter's observation that "the [ACS's] margin of error increases as the sample size—and, thus, the geographic area—decreases" is "strikingly similar" to the study's assertion that "the [ACS's] accuracy for small units of geography is extremely poor." *See* Pls.' Ex. I. How those statements are "strikingly similar" is, to put it mildly, not self-evident. Plaintiffs' remaining examples (*see id.*) are of a piece, and their pattern-matching exercise reads more like the product of a conspiracy theorist than a careful legal analysis.

Indeed, the Gary Letter is far more similar to briefs filed in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), than to the Hofeller study. The Gary Letter expressly cites *Evenwel* in its discussion of the ACS, and Gore testified that he was familiar with the case and had read the briefs in it. *See* Gov't

Ex. G, Gore Dep. 339:13-340:4. Unsurprisingly, the Gary Letter contains many similarities—some even "striking"—to, for instance, the amicus brief filed by former Directors of the U.S. Census Bureau. *See* Gov't Ex. D. That brief identifies the same problems with using ACS citizenship data that the Gary Letter identifies, often using identical language, as the attached chart (Gov't Ex. C) demonstrates. Other amicus briefs in *Evenwel* also address the same problems, using similar language. *See, e.g.*, Br. for United States at 22–23; Br. of Democratic Nat'l Comm. at 15–19; Br. of Nathaniel Persily et al. at 11–24. (Those and other *Evenwel* briefs are available at www.scotusblog.com/case-files/cases/evenwel-v-abbott.) The Persily brief even describes the problems with the ACS "in the exact same order," Pls.' Mot. at 3, as the Hofeller study and the Gary Letter, exposing the speciousness of Plaintiffs' argument on that score too. *See* Br. of Nathaniel Persily et al. at 16-24.

Moreover, it is hardly surprising that the Gary Letter, *Evenwel* briefs, and Hofeller study all describe similar problems with ACS citizenship data. Those issues are widely known, and have been discussed in case law and academic literature for years. *See, e.g.*, *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1030 (E.D. Mo. 2016); *Fabela v. City of Farmers Branch, Tex.*, 2012 WL 3135545, at *7 (N.D. Tex. Aug. 2, 2012); *Benavidez* v. *Irving Indep. Sch. Dist., Tex.*, 690 F. Supp. 2d 451, 457-458 (N.D. Tex. 2010); Justin Levitt, *Democracy on the High Wire*, 46 U.C. Davis L. Rev. 1041, 1109 n.116 (2013); Nathaniel Persily, *The Law of the Census*, 32 Cardozo L. Rev. 755, 776-777 (2011). The Census Bureau itself has long acknowledged these limitations of the ACS. *See, e.g.*, U.S. Census Bureau, *A Compass for Understanding and Using American Community Survey Data: What General Data Users Need to Know*, at 4, 8-11 (Oct. 2008), *available at* https://www.census.gov/content/dam/Census/library/publications/2008/acs/ACSGeneralHandbook.pdf. The assertion that Gore relied on a private, unpublished study to compile information that is widely known and publicly available is absurd.

b. Without any actual evidence that the Gary Letter relied on or was even influenced by the unpublished Hofeller study, Plaintiffs attempt to build a link by a circuitous path. According to Plaintiffs, a paragraph in a letter that Mark Neuman gave to Gore (Neuman Letter) matches a paragraph found in a document on one of Hofeller's hard drives. From this, Plaintiffs leap to the conclusion that a completely separate document on one of Hofeller's hard drives (*i.e.*, the unpublished study) also must have made its way to Gore—through mysterious and unidentified channels. Plaintiffs' illogical speculation is baseless.

Even assuming Hofeller gave Neuman a paragraph from one document on his hard drive, it would not even arguably show that he also gave an entirely separate document (the study) to Neuman, much less that Hofeller (or anyone else) gave it to Gore. Indeed, although Plaintiffs state that Neuman produced the Neuman Letter in discovery, they do not say that Neuman produced a copy of the 2015 study, because he did not. That, in turn, strongly suggests that he did not have it in his possession, custody, or control. The Department of Justice, too, produced the Neuman Letter but not the 2015 study. That is because the study was not in the possession, custody, or control of any of the relevant custodians at DOJ. Those facts alone rebut Plaintiffs' baseless assertions that DOJ or Gore had the Hofeller study and based the Gary Letter on its contents.

Nor is there any logical basis to draw a link between the Neuman Letter and the Gary Letter. Plaintiffs' assertion that the "December 2017 DOJ letter was adapted from the Neuman DOJ Letter, including, in particular, Dr. Hofeller's VRA rationale" is risible. The Gary Letter bears no resemblance to anything in the Neuman Letter, including the nonsensical paragraph allegedly written by Hofeller. *Compare* Pls.' Exs. G & H *with* Gov't Ex. F. Neither the text nor the substance of the Neuman Letter appears anywhere in the Gary Letter, and Neuman himself testified that he "wasn't part of the drafting process of the [Gary] [L]etter" and that the Neuman Letter is "very different" from the Gary Letter.

Gov't Ex. H, Neuman Dep. 114:19-20, 280:23-24. Tellingly, Plaintiffs have had the Neuman Letter for *months*, yet never previously suggested that it bore any resemblance to the Gary Letter. Plaintiffs' repeated insistence on conflating the two documents, as if the Neuman Letter were an early draft of the Gary Letter, is disingenuous, misleading, and contradicted by the evidence in the record.

2. In addition to incorrectly claiming that the Gary Letter was based on the unpublished Hofeller study, Plaintiffs allege that Gore and Neuman testified falsely about Hofeller's involvement in drafting the Gary Letter. As explained above, neither Hofeller nor his unpublished study played any role whatsoever in the drafting of the Gary Letter, so Plaintiffs' allegations fail at the outset. But they fail even on their own terms.

a. Plaintiffs assert that "Gore repeatedly testified that he prepared the initial draft of the DOJ letter, failing to disclose that Neuman gave a draft of the DOJ letter in October 2017." Pls.' Mot. at 1. The first half of that sentence is unequivocally true: Gore *did* prepare the first draft of the *Gary Letter*, and Plaintiffs have not identified any evidence to the contrary. *See* Ex. G, Gore Dep. 152:4-155:8. (Again, Plaintiffs' insistence on calling both the Neuman Letter and the Gary Letter "the DOJ letter" is misleading because it willfully conflates two entirely different documents.)

As for the second half: Gore, it is true, did not testify that Neuman gave him a draft of the Neuman Letter. But that is because *Plaintiffs did not ask him about it.* Gore disclosed that he talked to Neuman while drafting the Gary Letter. *See* Ex. G, Gore Dep. 437:20-438:13. When Plaintiffs asked for the substance of that conversation, the government appropriately asserted deliberative-process privilege—an assertion that Plaintiffs chose not to challenge. *Id.* at 437:14-20. And instead of following up to ask whether Neuman gave him any materials, Plaintiffs simply moved on to other topics. *Id.* at 437:22-438:13. The lack of testimony from Gore about the Neuman Letter is thus the result of Plaintiffs' own deposition techniques and strategic litigation choices. Gore's testimony was entirely truthful.

Perhaps more important, *Plaintiffs have long known that Gore had the Neuman Letter.* The government produced the Neuman Letter in full in discovery. *See* Gov't Ex. E, at 4–5. In the cover email to Plaintiffs' counsel, the government expressly said: "These materials were collected from John Gore" "in hard copy." *Id.* at 3. Accordingly, Plaintiffs have known since at least October 23, 2018, that Gore had the Neuman Letter—which belies their repeated claims that they learned that fact only recently. It is thus unclear how Plaintiffs could have been misled by Gore's failure to tell them something they (1) did not ask him and (2) have known since last October. Plaintiffs' obliviousness is not a valid basis to sanction the government.

Plaintiffs' other accusations of false or misleading testimony on the part of Gore are even more perplexing. For example, they assert that "Gore, meanwhile, testified that he 'drafted the initial draft of the [Gary Letter] sometime around the end of October or early November of 2017,' and he did not name Neuman or Dr. Hofeller as people who provided 'input' on the initial draft." Pls.' Mot. at 2. Of course the reason Gore did not identify Neuman or Hofeller as people who provided input on the Gary Letter is that neither Neuman nor Hofeller provided any input on the Gary Letter. Plaintiffs have identified no evidence to the contrary. Similarly baseless is Plaintiffs' denunciation of Gore for not "disclos[ing] that Dr. Hofeller ghostwrote a substantial part of the Neuman DOJ Letter setting forth the VRA rationale," and for "conceal[ing] Dr. Hofeller's role in crafting the October 2017 draft letter and the VRA enforcement rationale it advanced." Pls.' Mot. at 1, 3. Again, Plaintiffs have provided no evidence whatsoever that Gore was aware of Hofeller's involvement in anything, much less his alleged contribution of a cryptic paragraph in the Neuman Letter. Besides, as noted above, Plaintiffs neglected to ask Gore about any materials he might have received from Neuman, so Gore

never opined on what he thought of that letter or who he thought might have contributed to it.

b. Plaintiffs attack Neuman's testimony on similar grounds. Neuman is not a governmental employee and was represented by private counsel in this litigation. His acts or omissions are thus not attributable to the government and provide no basis for sanctions against the government. Nevertheless, Plaintiffs' accusations against Neuman fail for largely the same reasons as with Gore.

Plaintiffs assert that "Neuman testified that his October 2017 meeting with Gore was *not* about a 'letter from DOJ regarding the citizenship question,' and that he gave Gore only a different document." Pls.' Mot. at 3. That is false. Neuman never said he gave Gore "only" a different document. Plaintiffs asked him what he gave to Gore, and Neuman answered: "Mainly the—mainly a copy of the—of the letter from the Obama Administration, Justice Department, to the Census Bureau on the issue of adding a question on the ACS." Gov't Ex. H, Neuman Dep. 123:25-124:3. After asking some follow-up questions about that document, *id.* at 124:4-126:16, counsel moved on to another topic, *see id.* at 126:19-20 ("Did [Gore] provide you any information at that meeting?"). Counsel never asked *what else*, if anything, Neuman gave Gore beyond the Obama-era document. Neuman's failure to inform Plaintiffs that he also gave Gore a copy of the Neuman Letter is thus traceable to Plaintiffs' inadequate deposition questioning, not Neuman. (Besides, as noted above, Plaintiffs already knew that Gore had received a copy of the Neuman Letter.)

Also the product of Plaintiffs' own deposition decisions is Neuman's alleged failure to inform Plaintiffs of Hofeller's purported role in drafting the Neuman Letter. Neuman was discussing the letter's authorship when the questioner cut him off: "I don't—I don't want—I'm not asking you to tell me about who the original author was or anything." Gov't Ex. H, Neuman Dep. 281:23-25. It is quite rich for Plaintiffs to now complain about Neuman's failing to tell them something he was instructed not to tell them. And Plaintiffs did not lack for opportunity; Neuman testified at length about Hofeller and the discussions they had about redistricting and the census. *See id.* at 33:2-10, 36:19-45:14, 51:7-53:3, 55:9-59:6, 64:18-67:14, 89:11-90:13, 100:18-101:7, 136:17-139:3, 143:13-144:6.

c. In a chart attached to their motion, Pls.' Ex. A, Plaintiffs repeat the allegations of misrepresentations above and add additional allegations, including about statements in the government's court filings. All of the allegations are meritless. The government has prepared an expanded version of Plaintiffs' chart, Gov't Ex. A, explaining that there are no misrepresentations in Gore's testimony, Neuman's testimony, or the government's filings.

3. Plaintiffs' assertions are not only false, but legally irrelevant as both a procedural and substantive matter.

Procedurally, it is too late to reopen the evidence in this already-closed case (setting aside that this Court has no jurisdiction over that aspect of the case while the Supreme Court considers the government's appeal). Moreover, the supposedly "new" evidence from Hofeller's files likely would be inadmissible, in particular because none of it has been authenticated and all of it is hearsay. *See* Gov't Ex. B (describing some of the evidentiary problems with Plaintiffs' submissions). It would be improper to impose sanctions on the basis of inadmissible evidence. To the extent Plaintiffs claim the "new" evidence is their learning that Gore had the Neuman Letter, as discussed above, they knew that in October and decided not to pursue it further. Plaintiffs also made the strategic litigation choice not to challenge the government's assertion of deliberative-process privilege over Gore's discussions with Neuman, and similarly decided not to "close out" their questioning of Neuman on that point. Plaintiffs are not entitled to a do-over.

Substantively, the "new" evidence is irrelevant because the critical issue in this APA case is

whether the Secretary provided an objectively rational basis for his decision to reinstate the citizenship question. Nothing in the private files of a deceased political operative can affect the resolution of that issue. To the extent Plaintiffs believe the "new" evidence affects their equal-protection claim, the question there is whether *Secretary Ross* harbored discriminatory animus. Not even Plaintiffs allege that Secretary Ross was aware of Hofeller's unpublished 2015 study or its ideas. And this Court has already determined that the private motivations of various non-governmental actors cannot be attributed to the Secretary. *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 570–71 (S.D.N.Y. 2019). The secret motivations of Hofeller, allegedly memorialized in a private, unpublished study recovered from his hard drive long after his death, likewise are not attributable to the Secretary.

Finally, Plaintiffs have misrepresented the nature of Hofeller's study. Contrary to their representation, the study did *not* conclude "that adding a citizenship question to the 2020 Census 'would clearly be a disadvantage to Democrats' and 'advantageous to Republicans and Non-Hispanic Whites' in redistricting." Pls.' Mot. at 1. Rather, the study concluded that "[a] *switch to the use of citizen voting age population* as the redistricting population base for redistricting would be advantageous to Republicans and Non-Hispanic Whites," Pls.' Ex. D at 9, and that "[*u*]*se of CVAP* would clearly be a disadvantage for the Democrats," *id.* at 7. Those statements demonstrate no discriminatory animus against anyone; they are empirical observations about the likely impact of using CVAP for redistricting. They are also inapposite to Plaintiffs' claims. Plaintiffs' theory is *not* that the citizenship question will harm them *because it will enable the use of CVAP* in redistricting. Rather, their theory is that the citizenship question harms them by causing an undercount in certain noncitizen populations *regardless* of whether future redistricting is done by CVAP or total population. Hofeller's study does not address that issue at all.

* * * * *

The Department of Justice takes accusations of false testimony very seriously. For the reasons set forth above and in the attached charts, Plaintiffs' accusations are meritless. Plaintiffs had an obligation to conduct a pre-filing investigation before leveling such inflammatory accusations, especially against a high-ranking DOJ official. And they have had ample time to conduct that investigation; according to the *New York Times*, Plaintiffs' counsel have had the Hofeller materials since at least February. *See* Gov't Ex. L, at 3. Yet they appear to have spent more time coordinating with the media—the detailed *Times* article was posted online less than an hour after the ECF filing notice—than performing the requisite investigation. Plaintiffs apparently hope that by filing their eleventh-hour motion they might (improperly) derail the Supreme Court's resolution of this case. There is no other plausible explanation for why they spilled so much ink describing "new" evidence that they have known since October and conjuring a conspiracy theory involving a deceased political operative that essentially hinges on wordplay. The Court should deny their baseless motion.

Dated: June 3, 2019

Respectfully submitted,

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CC: All Counsel of Record (by ECF)

Exhibit H

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 25 2019

The Honorable Elijah E. Cummings
Chairman
Committee on Oversight and Reform
U. S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The Department of Justice (Department) writes to correct the record regarding the transcribed interview of Department official John Gore and to provide context for the circumstances that gave rise to the interview. As set forth below, the March 14, 2019 Memorandum from the Committee's Majority Staff, entitled "Supplemental Memo on Transcribed Interview with John Gore Regarding Addition of Citizenship Question to Census" (Supplemental Memorandum), mischaracterizes Mr. Gore's testimony and the record in this matter.

The Constitution establishes the executive and legislative branches as co-equal. "The constitutional role of Congress is to adopt general legislation that will be implemented—'executed'—by the executive branch."[1] As part of its legislative function, Congress has "[b]road . . . power" to conduct oversight, but that power is not "without limitations" and does not extend to inquiring "into matters which are within the exclusive province of one of the other branches of Government."[2] Moreover, in the course of carrying out its duty to faithfully execute the law, including its duty to represent the United States in court, the executive branch may have "a legitimate, constitutionally recognized need to keep certain information confidential."[3]

As co-equal branches of government, Congress and the executive branch have "the obligation . . . to accommodate the legitimate needs of the other," where "Congress has a legitimate need for information that will help it legislate, and the executive branch has a legitimate, constitutionally recognized need to keep certain information confidential."[4] The executive branch

[1] Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153, 153 (1989) (Congressional Requests).

[2] *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959).

[3] Congressional Requests, 13 Op. O.L.C. at 157.

[4] *Id.* at 157-58.

and the Department have long maintained a "general practice [of] attempt[ing] to accommodate whatever legitimate interests Congress may have in obtaining information, while, at the same time, preserving executive branch interests in maintaining essential confidentiality."[5] The executive branch and Congress have facilitated this interbranch cooperation through an "accommodation process" that calls upon each branch to "explain to the other why it believes its needs to be legitimate" and "to assess the needs of one branch and relate them to those of the other."[6]

Consistent with this accommodation responsibility, the Department agreed to make Mr. Gore voluntarily available to the Committee for a transcribed interview. The Department conditioned this agreement on several mutual understandings. Chief among those was the Committee's agreement that the Department would have a full and fair opportunity to review the transcript of Mr. Gore's testimony before it was made part of the Committee record, and that the transcript would not be made public or become part of the record prior to that review. In addition, and importantly, the Department maintained throughout this phase of the accommodation process that Mr. Gore would not be able to answer questions bearing on the Department's internal deliberations. The Committee was well aware of the Department's position on the scope of the transcribed interview and elected to move forward with the interview under those limitations.

This mutual understanding was vital to the Department's willingness to make Mr. Gore available for a voluntary interview. As the Department repeatedly explained to the Committee, the Department has an essential need to maintain the confidentiality of its internal deliberations. Maintaining confidentiality in executive branch deliberations facilitates robust and open discussion. Fully-informed decision-making would be chilled if executive branch officials and staff believed that those discussions could become public. Moreover, the Department continues to represent the United States in ongoing litigation, including in the United States Supreme Court, regarding the Commerce Department's decision to reinstate the citizenship question on the 2020 Census. The United States' litigation position regarding privileges, which was not challenged in litigation, could be compromised if those very same confidential deliberations were made public through a concurrent oversight process.

Premised upon our mutual understanding, Mr. Gore appeared voluntarily and was questioned by majority and minority Committee staff for several hours on March 7, 2019. Mr. Gore answered hundreds of questions from Committee staff. When Mr. Gore did not answer a question during the interview, he did so only on the instruction of the Department's counsel and based on the Department's legitimate confidentiality and litigation interests. Both majority and minority staff stated on the record that they had asked all of their questions of Mr. Gore and had no further questions at that time.[7] This process represents a good faith effort by the Department

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[5] *Id.* at 153.

[6] *Id.* at 159.

[7] Transcribed Interview of John Gore (March 7, 2019) at 99 (minority), 179 (majority) (Gore Transcript).

to accommodate the Committee and to establish a record of which questions implicate vital executive branch confidentiality interests and remain open for further discussion in the accommodation process.

The Committee also had access to a transcript of Mr. Gore's seven-hour deposition in the civil litigation before interviewing Mr. Gore. The Department offered that transcript to the Committee, and it is our understanding that the Committee obtained that transcript from another source.

In light of these good faith efforts by the Executive Branch, the Department is disappointed that the Committee has acted in a manner inconsistent with the spirit of mutual accommodation.

On March 14, just one week after Mr. Gore's interview, the Committee publicly released the Supplemental Memorandum, which includes and mischaracterizes Mr. Gore's testimony and provides selective, misleading excerpts from the transcript. On the same day, the Committee issued a press release that linked to the Supplemental Memorandum on both its website and its Twitter feed.[8] The Committee provided the Supplemental Memorandum to its members and referenced the Supplemental Memorandum repeatedly in its questioning of Secretary Ross at a public hearing that same day. The Department did not have a full and fair opportunity to review the transcript prior to the Committee's public disclosure of portions of it, nor did the Department receive an advance copy of the Supplemental Memorandum for review.[9] This has limited the Department's ability to timely respond to mischaracterizations in the record.

The Supplemental Memorandum mischaracterizes Mr. Gore's testimony to the Committee in at least four ways. First, the Supplemental Memorandum alleges that Mr. Gore exhibited a "refusal to answer" the Committee's requests.[10] This is an unfair characterization. Mr. Gore answered over five hundred questions posed by Committee staff, and when he did not answer, he did so only on the instruction of Department counsel. As the Committee knew, the Department's accommodation was to make Mr. Gore available for a voluntary interview to answer only those

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[8] Oversight Committee (OversightDems). "News Alert: Chairman @RepCummings releases memo on interview with #DOJ Official on citizenship question for #2020Census https://oversight.house.gov/news/press-releases/cummings-releases-memo-on-interview-with-doj-official-on-citizenship-question-0." Mar. 14, 2019, 10:30 a.m. Tweet. https://twitter.com/OversightDems/status/1106216034812547073.

[9] Majority staff emailed the Department after 6 p.m. on Tuesday, March 12, inviting the Department to review the transcript the next day in Committee offices. The Department was unable to review the transcript in Committee offices on Wednesday, March 13. The Department was offered a subsequent opportunity to review the transcript of Mr. Gore's interview in Committee offices on March 15, after issuance of the Supplemental Memorandum, and the appropriate attorneys did so on March 19.

[10] Supplemental Memorandum at 1.

questions that could be answered without compromising the ongoing litigation or other executive branch confidentiality interests. This was an appropriate effort to satisfy the Committee's request at this phase in the accommodation process.[11] The Supplemental Memorandum's suggestion that the Department's instructions were somehow improper or unexpected contravenes both our shared understanding that the Department would make those instructions and the Committee's fundamental accommodation obligation.[12]

Second, the Supplemental Memorandum misleadingly describes as "new information" received from Mr. Gore's interview the existence of a "secret" memorandum and note authored by a Department of Commerce official.[13] But Mr. Gore previously testified regarding the memorandum and the note during his deposition in the civil litigation and the Committee had access to a transcript of that deposition prior to interviewing Mr. Gore.[14] The Department also provided a description of the memorandum and note on a privilege log produced in the *New York v. Department of Commerce* litigation. The parties in that case extensively litigated the government's assertion of privilege over those documents. After an in camera review, the district court upheld the government's assertion of privilege and held that the government could not be compelled to produce those documents to the plaintiffs.[15] Producing those documents to the Committee could be viewed in these circumstances as a waiver of the privilege that the federal court already has upheld.

Third, the Supplemental Memorandum incorrectly implies that Mr. Gore identified Mark Neuman as "a former member of the Trump Transition Team."[16] Mr. Gore, however, offered no such testimony. The transcript excerpts in the Supplemental Memorandum omit the portion of Mr. Gore's testimony where he stated that he believes Mr. Neuman to be a former employee of the Department of Commerce or the Census Bureau who in the fall of 2017 was serving as an "advisor" to the Commerce Department on Census-related issues.[17] Mr. Gore had no knowledge of, and has never testified about, whether Mr. Neuman was affiliated with the Trump Transition Team.

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[11] *See* Congressional Requests, 13 Op. O.L.C. at 157-62.

[12] *See id.*

[13] Supplemental Memorandum at 1-2.

[14] Gore Deposition, 118:18-125:22 (Oct. 16, 2018) (discussing the note and the memorandum).

[15] *See New York v. Department of Commerce*, No. 18-CIV-2921, Minute Order, ECF No. 361 (S.D.N.Y. Sept. 30, 2018).

[16] Supplemental Memorandum at 2.

[17] *See* Gore Transcript at 22.

Finally, the Department is concerned with the Committee's mischaracterization of the draft letter that Mr. Neuman provided to Mr. Gore. The Department produced that draft letter in litigation and has since produced it to the Committee. The Chairman's opening statement described that draft as an "an initial draft of a letter from the Department of Justice asking for the citizenship question to be added."[18] To the extent that the Chairman suggested that the draft Mr. Neuman provided served as an "initial draft" of the Department's December 12, 2017 letter, that suggestion is incorrect. Any such suggestion also is unsupported by the draft itself and the transcript of Mr. Gore's testimony. The transcript confirms that at no time did Mr. Gore agree that the draft he received from Mr. Neuman served as a basis for, let alone "an initial draft of," the Department's December 12, 2017 letter. Unfortunately, this mischaracterization has implied, perhaps unintentionally, that Mr. Gore's statements during his deposition and his transcribed interview, in which he stated that he wrote the first draft of the December, 12, 2017 letter, were untrue. Mr. Gore's testimony in his deposition and his testimony to the Committee were truthful. The Department rejects any implication to the contrary as it is inconsistent with the evidence.

The Department respectfully requests that, in the interests of accuracy and transparency, the Committee make this letter part of the legislative record and disseminate it to all Committee members and staff. The Department also requests that the Committee withdraw or correct the Supplemental Memorandum based upon the information provided in this letter.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Jim Jordan
Ranking Member

[18] Opening Statement Chairman Elijah E. Cummings Hearing with Commerce Secretary Wilbur Ross March 14, 2019, at 2. https://oversight.house.gov/legislation/hearings/commerce-secretary-wilbur-l-ross-jr.